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Volume XXXII.

1917.

PUBLISHED BY

MR. R. NARAYANASWAMY AIYAR, B.A., B.L.,

High Court Vakil, Mylapore, Madras, S.

MADRAS:

PRINTED BY G. RAMASWAMY NAIDU & SON AT THE COMMERCIAL PRESS, TRIPLICANE.

1917.

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Judges of the High Court

1917

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THE

Madras Law Journal Reports.

PART I.] JANUARY, 1917. [VOL. XXXII

PRIVY COUNCIL.

Present :—Lord Shaw, Sir John Edge, and Sir Lawrence Jenkins.

[On Appeal from the High Court at Fort William in Bengal.]

Chhatrapat Singh Dugar ... *Appellant* *

v.

Kharag Singh Lachmiram and others ... *Respondents.*

P. C. Chhatrapat Singh Dugar *v* Kharag Singh Lachmiram

Provincial Insolvency Act, 1907 (*Act III of* 1907), *Ss.* 5, 6, 14, 15, 16. *Debtor's insolvency petition—Order of adjudication—Statutory right of debtor to such order on complying with the terms of the Act.*

The Provincial Insolvency Act, 1907, entitles a debtor to an order of adjudication when its conditions are fulfilled. This does not depend on the Court's discretion, but is a statutory right.

The stage at which to visit with its due consequences any misconduct of a debtor is when his application for discharge comes before the court, and not on the initial proceeding.

Appeal from an order of the Calcutta High Court, (Brett and Sharf-ud-din, JJ.) dated April 12, 1912, affirming an order of the District Judge of Murshidabad.

Chhatrapat Singh Dugar being heavily in debt and pressed by sundry creditors, conveyed many of his immoveable properties to various relations, who preferred claims to such properties when any creditor took them in execution. Such devices at length proving unavailing, Chhatrapat applied to the Calcutta High Court under the Presidency Insolvency Act (11 Vict C. 21) to be declared an insolvent, but his application was refused on June 7, 1907 by Woodroffe, J., who characterised it as an abuse of the Court's process, and an appeal against such order was dismissed on November 26, 1907. His creditors renewing their efforts against his property, Chhatrapat on May 21, 1909 presented an insolvency petition at Murshidabad under the Provincial Insolvency Act (III of 1907). This petition was opposed by certain creditors, and affidavit filed alleging various acts of bad faith by Chhatrapat. The District

* March 14 and November 1, 1916 and 20th November, 1916.

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Chhatrapat Singh Dugar v. Kharag Singh Lachmiram.

Judge, relying on these affidavits, held that he had no reason to differ from Woodroffe, J., that the application was "an abuse of the process of the Court" and dismissed it. An appeal was preferred to the High Court, but summarily dismissed under Order XLI Rule II, (of the Code of Civil Procedure, 1908).

The present appeal was part heard on March 14, 1916 when Mr. Dube for respondents submitted that in the absence of the affidavits on which the District Judge relied the Board could not properly hold that the Lower Courts erred in their view that the application was an abuse of the process of the Court. The appeal was therefore adjourned for copies of the affidavits, which on receipt proved merely to set out the fraudulent and dishonest conduct of the petitioner before filing his petition, and to suggest that his only object in filing it was still further to impede the creditors who were pressing him.

At the hearing on November 1, 1916,

Sir Erle Richards, K.C. and *Sir W. Garth,* for appellant, submitted that the Court could not refuse to make an order of adjudication on the sole ground that the debtor has in the past endeavoured to defeat or delay his creditors. There have been two sets of Acts in England (1) for the relief of debtors, (2) for the administration of estates in bankruptcy. In India till 1907 only the first existed and a debtor could only get relief under certain provisions of the Civil Procedure Code designed primarily for his benefit. But Act III of 1907 alters this : it follows the English Act of 1883, (46 and 47 Vict. C. 52) of which it reproduces Ss. 7 and 8. Under the English Act it is well settled that in the case of a debtor's petition the receiving order follows as a matter of course : you do go into the debtor's conduct, but at a later stage. The decision of Woodroffe, J., was under 11 and 12 Vict. C. 21, and the District Judge was wrong in applying the same reasoning to a totally different statute. Under the Provincial Insolvency Act, once the debtor complies with the provisions of Ss. 5, 6 and 12, the Court has no option but to make an order of adjudication. Ss. 15 and 16 must be read together : the words that "for any other sufficient cause no order ought to be made" do not apply to a debtor's petition, but only to a creditor's.

The decision against which we appeal is opposed to a long series of decisions in India both before and after it,

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Uday Chand v. *Ram Kumar* [1], *Samiruddin* v. *Kadumoyi Dasi* [2], *Kali Kumar Das* v. *Gopi Krishna* [3], *Abdur Rezak* v. *Basiruddin Ahmad* [4], *Girwardhari* v. *Jai Narayan* [5], *Trailoki Nath* v. *Badri Das* [6], *Bava Jeer* v. *Bava Rangaswami* [7].

Here and there, as in the last case, mention is made of the inherent power of the Court to refuse an application on the ground that it is an abuse of the process of the Court: but the Act does not countenance any such refusal. It is not necessary for us to argue that there cannot be circumstances which would constitute such an abuse, but certainly there are none such here. In England there have been two or three cases where applications have been dismissed on such a ground, but the circumstances of all of them are very peculiar and quite unlike the present case. Reference was made to

In re Betts [8], *In re Painter* [9], *In re Hancock* [10].

In the present case the petition, it now appears, was dismissed because the debtor, previous to filing it, had committed acts of bad faith. This was no ground for such dismissal, the debtor's past frauds may be considered when he wants his discharge under Ss. 44 and 45 of the Act, but cannot prevent the order of adjudication, which is made to secure the administration of his assets for his creditor's benefit.

L. De Gruyther, K. C. (*Dube* with him) for respondents:—In the Mufussil, before 1907 the Court admittedly had a discretion: and under 11 and 12 Vict. C, 21, as administered in Calcutta, the Court still has a discretion. The question is whether the new statute has made a material alteration, so that the law in the mufussil is different from that in the Presidency towns. The word "may" in S. 5 continues the discretion of the Court: unless that word means "must" the decision appealed against is right. The debtor's object in filing this petition is absolutely fraudulent—it is to stave off the evil day. S. 15 of the Act should be read with S. 14 the words "or for any other sufficient cause" in S. 15 refer to S. 14 (2) which lays down that the conduct of the debtor is to be considered. There is no object

1. (1910) 15 C. W. N. 218.
2. (1910) 15 C. W. N. 244.
3. (1910) 15 C. W. N. 990.
4. (1911) 17 C. W. N. 405.
5. (1910) I. L. R. 32 A. 645.
6. (1914) I.L.R. 36 A. 250. (F.B.)
7. (1911) I. L. R. 36 M. 402.
8. (1901) 2 K.B. 39.
9. (1895) 1 Q.B. 85.
10. (1904) 1 K. B. 585.

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for that provision if the Court has to declare him insolvent whatever it thinks of his conduct. In several of the Indian cases cited the Court's power to dismiss a debtor's petition has been recognised: vide especially the remarks of Chamier, J. in *Girwardhari* v. *Jai Narayan* [1].

Dube followed. The word "may" in S. 5 should be given its natural meaning in the absence of clear provision to the contrary. *Delhi and London Bank* v. *Orchard* [2]. It is unlikely that by "may" here the Legislature meant "must," for that would mean one law in the Mufussil and another at the Presidency.

If this be a matter of discretion, two Courts in India have concurred as to how such discretion should be exercised.

No reply was called for.

Their Lordships' judgment was delivered (Nov. 20, 1916) by

Sir Lawrence Jenkins.

Sir Lawrence Jenkins:—Chhatrapat Singh Dugar, the present appellant, on the 21st May, 1909, presented as a debtor an insolvency petition under the Provincial Insolvency Act, 1907, to the District Court of Murshidabad for an order adjudging him an insolvent.

His application was opposed by the present respondents and was dismissed. The debtor's consequent appeal to the High Court in Bengal was dismissed by an order of the 12th April, 1912, and an application for review of the High Court's judgment was equally unsuccessful. This appeal has been preferred by the debtor to His Majesty in Council from the High Court's order of the 12th April, 1912.

The Provincial Insolvency Act presents a complete and exact delineation of a debtor's right to an order of adjudication, on his own petition. Subject to the conditions specified in the Act, if a debtor commits an act of insolvency an insolvency petition may be presented by the debtor, and the Court may on such petition make an order adjudging him an insolvent. The presentation by him of a petition is deemed an act of insolvency, and on that petition the Court may make an order of adjudication (section 5).

Provision is made by the 6th and succeeding sections for the presentation and admission of the insolvency petition, and other matters of procedure, but no express reference to them need

1. (1913) I. L. R. 32 A. 645 at 650. 2. (1877) L. R. 4 I.A. 127, 135.

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be made in the circumstances of this case. It will suffice to say that all that is thus prescribed has been observed by the present debtor.

By the 14th section it is enacted that on the day fixed for the hearing of the petition or on any subsequent day to which the hearing may be adjourned, the Court shall require proof that the debtor is entitled to present the petition, and shall examine him if he is present.

Then it is provided by Ss. 15 and 16 as follows :—

"15 (1). Where the Court is not satisfied with the proof of the right to present the petition or of the service of notice on the debtor as required by S. 12 sub-section (3), or of the alleged act of insolvency, or is satisfied by the debtor that he is able to pay his debts, or that for any other sufficient cause no order ought to be made, the Court shall dismiss the petition."

"16 (1). Where a petition is not dismissed under the preceding section...... the Court shall make an order of adjudication."

The dismissal of Chhatrapat's petition by the District Court does not purport to rest on any failure to comply with the express terms of the Act. What was held was that the application was an abuse of the process of the Court and so must be dismissed. Presumably it was on this ground, too, that the High Court dismissed the appeal; no other reason is indicated. It is to be regretted that the Courts in India allowed themselves to be influenced by this plea instead of being guided to their decision by the provisions of the Act. In clear and distinct terms the Act entitles a debtor to an order of adjudication when its conditions are satisfied. This does not depend on the Court's discretion but is a statutory right; and a debtor who brings himself properly within the terms of the Act is not to be deprived of that right on so treacherous a ground of decision as an "abuse of the process of the Court." This case illustrates the peril of this doctrine in India, for what has been treated by the Courts below as such an abuse appears to their Lordships in no way to merit this censure. It may, perhaps, give rise to a contest for priority between competing creditors, but that will be, if necessary, a matter for decision hereafter in the course of the insolvency. Be that, however, as it may, their Lordships are now concerned only with the debtor's position; and as to that they are satisfied that he has complied with all the conditions specified in the Act, and is entitled as of right to an order adjudging him an insolvent. This conclusion, apart from the decision under appeal, is in agreement with the current of authority in India, where it has been rightly

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held that the stage at which to visit with its due consequences any misconduct of a debtor is when his application for discharge comes before the Court, and not on the initial proceeding. As the dismissal of Chhatrapat's petition was, in their Lordships' view, erroneous, they will humbly advise His Majesty that the order of the High Court of the 12th April, 1912, be reversed with costs, and in lieu thereof an order be made discharging the order of the District Court and adjudging Chhatrapat Singh Dugar an insolvent. The respondents will pay the costs of this appeal.

Solicitors for Appellant: *G. C. Farr.*

Solicitors for Respondent: *Watkins and Hunter.*

A.P.P.

PRIVY COUNCIL.

Present :—The Lord Chancellor (Lord Buckmaster), Lord Atkinson, Lord Wrenbury and Mr. Ameer Ali.

[On Appeal from the Chief Court of Lower Burma.]

Maung Shwe Goh ... *Appellant* *

v.

Maung Inn and others ... *Respondents.*

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Maung Shwe Goh v. Maung Inn.

Contract of sale of real property—English rule that purchaser is equitable owner not applicable to those parts of India where the Transfer of Property Act is in force—date from which purchaser is entitled to rents and profits and vendor to interest on purchase money, how fixed—Transfer of Property Act, 1882 (*Act IV of* 1882) *S.* 54.

The principle of English law, that a contract for sale of real property makes the purchaser the owner in equity of the estates has no application to those parts of India where the Transfer of Property Act, 1882 (Act IV of 1882) is in force.

Semble, that the English rule based on such principle, by which the purchaser, when no date is fixed by the contract, is deemed to be entitled to the rents and profits and is liable for interest on unpaid purchase-money as from the time when he is or should be satisfied as to the vendor's title, is equally inapplicable.

But in this particular case the point was not decided, as it was held that the contract itself provided from what date the purchaser's ownership should begin.

Appeal from a decree of the Chief Court of Lower Burma dated 14th Dec. 1914, reversing an order of Ormond, J.

One G. W. Davis mortgaged some land to Maung Shwe Goh, the present appellant to secure the repayment of Rs. 50,000 and interest. Being unable to repay the amount due on the Mortgage Davis wrote a letter in the following terms:

"Rangoon, 4th April 1916."

"My dear Maung Shwe Goh,

I write this to inform you that as I have not got the interest

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* October 30 and 31, 1916 and 23rd November 1916.

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due on Rs. 50,000 ready now I request you to give me three months more for payment to you of all interest due thereon. Should I fail to do so on or before the 6th July 1906 I agree the whole land being sold to you for Rupees one lakh (Rs. 100,000). After deducting out of this amount Rs. 50,000 already received by me and all interest due thereon, the balance should be paid to me when the land shall become yours unconditionally."

Davis did not pay the interest due on the 6th July 1906. Maung Shwe Goh called upon him to carry out the promise to sell the land contained in the above letter. Davis repudiated the letter. On the 17th August 1906 Maung Shwe Goh instituted a suit for specific performance of the contract. Litigation between the parties went on until July 1911 when His Majesty's order in Council on an appeal by Davis was passed. The proceedings are reported (*Davis* v. *Maung Shwe Goh* [1]). Davis remained in possession of the property until the 24th March 1911, but paid no interest on the mortgage. In taking the account of what should be deducted out of the purchase price of Rupees one lakh the Deputy Registrar allowed Maung Shwe Goh the principal Rs. 50,000 and interest up to the 24th March 1911. Principal and interest amounted to Rs. 85784-5-1. This calculation was confirmed by the Original Court.

Two subsequent mortgagees of the land had at their own request been made parties to the execution proceedings. Of these one (the second respondent in this appeal) preferred an appeal to the Appellate side of the Chief Court, contending that Maung Shwe Goh should be allowed interest on the mortgage only up to 6th July 1906. This contention was upheld and the appeal allowed. Fox, C. J. and Parlett, J. holding that the maxim that equity regards as done what should have been done was applicable and that Maung Shwe Goh should be deemed the owner as from 7th July 1906.

Hence this appeal.

Sir H. Erle Richards, K. C. (*Coltman* with him) for appellants:—The question is whether " all interest due thereon " in Davis's letter means interest up to the date when appellant got the property or only interest up to the date when he became entitled to it.

1. (1911) L. R. 38 I. A. 155=38 C. 805.

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I submit that this is really a question of contract, and that on the true construction of the document appellant is entitled to interest till he got possession : that the mortgage ran on and that the lands were to become mine unconditionally when the account was cleared. At the time of the contract we already had a mortgage with a covenant to pay interest.

[*Lord Wrenbury.*—The phrase "all interest due thereon" occurs twice. Does it mean the same in both places ?]

I submit the letter does not mean we are to give up the rights we already had, and that we only contracted to release the mortgage debt on completion.

My second point is that the doctrines of equity invoked by the Chief Court do not apply. The principle that the purchaser is in equity the owner does not apply to India, owing to S. 54 of the Transfer of Property Act, 1882 (Act IV of 1882). The whole Act is not in force in Lower Burma, but this particular section is.

Reference was made to Dart's Vendors and Purchasers, 7th Edn., Vol. I, pp. 652, 653 : Whitley Stokes' Introduction to the Anglo Indian Codes, Vol. I, p. 730 and the notes to S. 54 in Shephard and Brown's Commentaries on the Transfer of Property Act (7th Edn. p. 187).

Coltman followed : The 6th July 1906 was not the date for completion, but only the date on which the contract was to become operative.

The 1st respondent, who was the legal representative of Davis's estate did not appear.

T. H. Cunliffe, K. C. (with him *D'Cotes Prudy* for *Kenelm Prudy,* serving with H. M. forces) for the second and third respondents (subsequent mortgagees). The Chief Court have correctly held that on the 6th July 1906 what was previously a mortgage became a contract of sale. There was never any question raised as to the vendor's title either before or after that date : the purchaser already had the title-deeds.

[*Lord Chancellor* : Is not the English doctrine based on this, that the purchaser is the owner and entitled to enter, and that the only thing which deters him is the uncertainty as to title ?]

It seems that in India he has not the right to enter.

[*Lord Wrenbury* : If he has no interest in the *res,* he has no right to enter. His interest in the *res* only dates from the registration of the transfer.]

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The time fixed for completion was, we submit, the 6th July 1906. We admit that completion was delayed by the wrongful conduct of the vendor: but the proper remedy is to make him responsible for the rents and profits, and give him interest on the unpaid purchase-money.

[*Lord Wrenbury.*—But in India he can't get the rents and profits, as he has no interest in the *res*: so on what ground should he pay interest on the unpaid purchase-money? We cannot fine people: what you say may be very fair, but we have to give effect to rights.]

The interest on the unpaid purchase-money should anyhow be set against the interest on the mortgage.

This Court held in the former appeal that the vendor lost his right to redeem on 6th July 1906. The whole object of the litigation was to save that right. Redemption is an essential part of mortgage. *Noakes and Co., Ltd.* v. *Rice* [1].

When the right to redeem went, the mortgage ceased to exist, and the interest on it similarly ceases. It is in the power of the Court to prevent any injustice to the purchaser by giving him rents and profits.

Our argument does not rest merely on the doctrine that the purchaser is in equity the owner, but on the broader rule that equity looks upon that as done which ought to be done.

The position of vendor and purchaser is inconsistent with that of mortgagor and mortgagee. On the true construction of Davis's letter, "interest due thereon" means interest up to 6th July 1906, at which date it was intended the account should be taken.

Sir Erle Richards, K. C., replied:

Their Lordships' judgment was delivered (November 23, 1916) by

Lord Buckmaster L. C.

Lord Chancellor:—This appeal is a step—and their Lordships hope the last step—in litigation, which was commenced on the 17th August, 1906, by the present appellant, who claimed against one George William Davis specific performance of a contract dated the 4th April, 1906, for the sale of some 19,318 acres of land situate in the Pegu district, Lower Burma. The question raised depends on the true construction of this contract, but in order to understand its meaning it is necessary to consider some antecedent facts.

1. (1902) A. C. 24, 30.

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On the 30th September, 1905, a formal mortgage of the property, which subsequently became the subject of the contract, was executed by the defendant Davis in favour of the appellant to secure the repayment of 50,000 rupees on the 30th December, 1905, together with interest at the rate of 8 annas per cent. per month, and also interest thereafter at the current bank rate of interest in Rangoon. It appears from the mortgage that it was really given as security for the payment of 50,000 rupees, the amount of 5 hundis which had been drawn by the mortgagor upon the mortgagee and negotiated by the mortgagor with the Bank of Bengal. The mortgage contained a formal conveyance of real property and a covenant, the effect of which has already been mentioned. It also contained a further and independent covenant that if the sum of 50,000 rupees should not be paid when it was due, the mortgagor would pay interest thereon at 8 annas per cent. per month, and also interest on the 50,000 rupees at the current bank rate until the principal should be duly paid. The hundis were not met by the mortgagor at the due date, and were renewed until the 4th April, 1906, on which date the mortgagor, not being in a position to pay the money, wrote to the plaintiff a letter in the following terms:—

"My dear Maung Shwe Goh,

"I write this to inform you that as I have not got the interest due on 50,000 rupees ready now I request you to give me three months more for payment to you of all interest due thereon. Should I fail to do so on or before the 6th July, 1906, I agree the whole land being sold to you for 1 lakh of rupees (100 000 rupees). After deducting out of this amount 50,000 rupees already received by me and all interest due thereon, the balance should be paid to me when the land shall become yours unconditionally."

The request was acceded to by the plaintiff, and the contract thus made is the contract in question.

The money was not paid by the date fixed, and on the 6th July, 1906, the mortgagee paid to the Bank of Bengal the 50,000 rupees due on the hundis, and thus became entitled to whatever rights were conferred upon him by the agreement. The mortgagor refused to execute a conveyance of the property to the plaintiff, indeed he denied the authenticity of his signature to the contract, and thus compelled the plaintiff to institute the proceedings out of which this appeal has arisen.

The learned Judge by whom the suit was heard dismissed it on the 18th February, 1908, but this judgment was reversed by

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the Chief Court of Lower Burma, and by their order of the 11th May, 1909, specific performance of the agreement contained in the letter of the 4th April, 1906, was ordered against the mortgagor, and this order was affirmed on appeal by this Board on the 5th July, 1911.

The defendant Davis died on the 14th August, 1911, and the first respondent to this appeal is his legal representative. The other respondents represent mortgagees from Davis under mortgages executed subsequently to that in favour of the plaintiff.

The appellant entered into possession of the property on the 24th March, 1911, but it does not appear that even up to the present time a proper conveyance of the equity of redemption has ever been executed in his favour, an order obtained from the Court on the 25th January, 1910, directing such conveyance to be executed on behalf of Davis by the Assistant Registrar, having been set aside upon the grounds that proper notice of the application had not been served upon Davis.

The present appeal arises out of an application which is in form for execution of the judgment for specific performance; and the question involved affects only the manner in which the purchase-money payable under the contract for sale ought to be calculated. On the part of the appellant, it is contended that interest continued to run upon his mortgage until the date when he entered into possession, that consequently the principal sum of 50,000 rupees, together with the agreed interest up to that date, ought to be deducted from the 100,000 rupees, which was the purchase price, and the balance only should be paid by him. This view was accepted by the Registrar and his decision was upheld by the Judge of the Chief Court, but was reversed by the Appellate Court, who decided that the appellant was only entitled to bring into account the amount due for principal and interest up to the 6th July, 1906. The foundation of this judgment depends upon the application to the contract of the 4th April, 1906, of the well-known rule by which the rights of vendors and purchasers of real estate are regulated in this country. In the English Courts, a contract for sale of real property makes the purchaser the owner in equity of the estate, and from this principle it follows that, where the rights as to payment of interest on the purchase-money are not regulated by the terms of the contract, the purchaser is deemed to be entitled to the

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rents and profits of the property, as from the time when he did take, or could safely have taken, possession; and interest on the purchase-money runs in favour of the vendor from that time. It has been pointed out to their Lordships that the underlying principle, upon which this rule depends, has no application to the sale of real estate in Lower Burma, since by S. 54 of the Transfer of Property Act, 1882 (a statute made applicable to Lower Burma), it is expressly provided that such a contract creates no interest in or charge upon the land. If, therefore, the contract was silent in dealing with the question of interest, their Lordships think that the appellant would have strong ground for contending that the reasoning in the Court of Appeal could not be supported. It is an unfortunate fact that this argument never appears to have been raised at any earlier stage of these proceedings; and their Lordships have not, therefore, the advantage of the opinion of the learned Judges of the Appellate Division upon this point. But the matter need not be pursued because, in their Lordships' opinion, apart altogether from this consideration, upon the true construction of the contract the appellant must succeed. At the date when the contract was executed a valid legal mortgage was on foot, containing an express covenant for payment of the 50,000 rupees and interest until the debt was discharged. The money was due when the contract was made, and the contract opens with the request for three months' further time for payment of the "interest due thereon." In this connection, it is clear that the "interest due thereon" is the interest payable under the mortgage deed up to the time, whatever it may be, on or before the 6th July, 1905, when the 50,000 rupees might be paid. On failing to pay at the date, the agreement became operative for sale of the land, and the final words, in their Lordships' view, which provided for deduction from the purchase price of the 50,000 rupees "and all interest due thereon," means that this deduction should be made at the time when the balance is to be paid, and this would be the completion of the contract. The mere fact that the phrase "interest due thereon" occurs twice in the contract does not involve the conclusion that the date up to which interest is to be calculated is the same on both occasions, but when once it is accepted that the dates are different all difficulty disappears, since it then follows that interest is by agreement continuing to run on the principal money. This

interest is that reserved under the mortgage deed, and it must continue to run until the debt is discharged, which can only be when the balance is struck and paid. If, therefore, possession had not been taken by the purchaser, and no default could be attributed to him, the interest would have gone on until the transfer was executed, but it appears that he has been put into possession under the contract, and of course he could not both retain the rents and receive the interest. The order therefore of the Registrar was quite right in allowing interest up to, but not beyond, the date when he took possession.

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Counsel for the respondents has urged that, by virtue of the contract, the mortgage was ended, since a mortgagee, who has contracted to buy the equity of redemption, stands in the position of a purchaser, which is inconsistent with that of a mortgagee. But, whatever might result from such argument, where the rights of the parties were entirely untouched by the terms of the contract, such consideration cannot apply where the contract has itself provided what the rights are to be. This, in their Lordships' opinion, is what the contract did, and they therefore think that the appeal succeeds.

The order appealed from must therefore be reversed with costs here and below, and the order of the Judge of first instance restored. The respondents will repay any costs paid to them by the appellant. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for Appellant:—*Arnould and son.*
Solicitors for Respondents:—*Stoneham and sons.*
A. P. P.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Abdur Rahim, Officiating Chief Justice, Mr. Justice Seshagiri Aiyar, and Mr. Justice Phillips.

K. A. N. Chidambaram Chettiar ... *Appellant* * *in both* (*2nd Defendant*).
v.
Krishna Vathiyar and others ... *Respondent in A.A.O. No. 51 of 1915.* (*Plff. and 1st Deft*).

Chidambaram Chettiar v. Krishna Vathiyar.

Civil Procedure Code, Act V of 1908, *S.* 47, *O.* 21, *R.* 2—*Agreement between parties to a suit that one of them should submit to a decree, with a private arrangement for the discharge of the decree within a certain date and that the other party should not within that date execute or transfer the decree—Decree passed in the suit—Application for execution within the time fixed in the agreement—Whether the agreement can be pleaded in execution*—Stare decisis *in processual law.*

* A. A. O. Nos. 51 and 98 of 1915. 15th August, 1916.

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Where the parties to a suit enter into an agreement by which one of the parties agrees to submit to a decree to be passed in the suit under an arrangement for the discharge of the decree in a particular manner within a certain date and that the other party should not within that date execute or assign the decree and a decree is consequently passed in the suit and the decree-holder seeks to execute the decree within the time fixed in the agreement and the judgment debtor pleaded the agreement in opposition, in execution proceedings.

Held by *Abdur Rahim, Offg. C.J.*, and *Seshagiri Aiyar, J.* (*Phillips, J.* dissenting) that such an agreement can be given effect to in execution proceedings under S. 47 of the code so as to operate as a stay of execution of the decree.

Per Phillips, J.—The omission of the words "and stay of execution" in S. 47 of the code of 1908 is deliberate and such an agreement cannot be given effect to in execution so as to operate as a stay of execution of the decree. A decree of Court should be executed as it stands and the executing court cannot go behind its terms and give effect to private arrangements excepting those falling under O. 21, R. 2, and O. 20, (2) of the code. A further ground for excluding such an agreement from consideration in execution proceedings is that the conduct of the parties amounts to an abuse of process of the court, for they have collusively induced the court to pass a decree, which according to their agreement was never to have effect.

Per *Curiam.*—An agreement to constitute an adjustment of the decree within the meaning of O. 21, R. 2 of the code should be subsequent to the decree.

Per *Seshagiri Aiyar, J.*—In matters of procedure, the principle of consistency will conduce to justice more than a strict adherence to logic; and courts should not upset a practice which has been prevalent for a long period of time in the presidency.

Per *Phillips, J.*—The principle of *stare decisis* need not be too strictly applied to questions of procedure, because an alteration in procedure, does not materially affect substantive rights, but only the method of enforcing them.

Appeals against the orders of the Court of the Subordinate Judge of Tinnevelly in R. E. P. No. 123 of 1914 and in Miscellaneous Petition No. 1502 of 1914 respectively, in Original Suit No. 59 of 1913.

The Court (Oldfield and Sadasiva Aiyar, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH:—

On 16th July 1914 the parties to these appeals entered into an agreement, set out in paragraph 2 of appellant's counter-affidavit, that he should submit to a decree in a suit by respondent then pending against him, that the former should make an arrangement for satisfaction of such decree within a fixed date and that the latter should not before that date execute or transfer it. A decree was passed against appellant accordingly. After it on 1st October 1914 he is alleged to have again made a similar agreement with the respondent. Both these agreements are relied on here as barring respondent's right to execute his decree.

We can deal shortly with the argument based on the agreement of 1st October 1914. It is not referred to specifically in the

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grounds of appeal to this Court, and it is not mentioned in Lower Court's order, which deals with the appellant's contention as based exclusively on the agreement before decree. In these circumstances we are led to infer that the later agreement was not relied on until the hearing before us, and we are fortified in this conclusion by appellant's admission that only oral evidence is available in support of it and the fact that respondent denies it. We therefore consider it no further.

The question is then whether the agreement of 16th July 1914 can be relied on; and, apart from authority we should be reluctant to answer it in the affirmative, because in our opinion such agreements, made without the knowledge of the Courts, result in evasions of Order XXI R. 2 (3) of the Civil Procedure Code, if not in other circumstances. Authority however in this Presidency to some extent authorises them, *Krishnamachariar* v. *Rukmani Ammal* [1] and *Rukmani Ammal* v. *Krishnamachary* [2]. In the first however of these cases the question was dealt with rather as one of evidence than of procedure and without detailed discussion of the provisions of the Code of Civil Procedure, whilst in the second the distinction between an agreement for stay of execution and one barring execution *in toto* was drawn, but does not appear to have received effect. On the other hand there is the case of *Benode Lal Pakrashi* v. *Brajendra Kumar Saha* [3] in the authorised reports, in which the right to rely on such an agreement as that before us was negatived. In these circumstances we refer for the decision of a Full Bench the question:—

"Whether it is open to appellant to rely on the agreement dated 16th July 1914 and referred to in paragraph 2 of his counter-affidavit in execution proceedings?"

These appeals came on for hearing on Thursday and Friday the 3rd and 4th days of August, 1916 on the question referred for the decision of the Full Bench.

[The agreement is set out in the judgment of Phillips, J.]

K. V. Krishnaswami Aiyar, for the appellant.

The agreement in question is not adjustment under O. 21 R 2 and it is an agreement which can be proved in execution under S. 47. An adjustment must be such as by its own effect would put an end to the decree and the rights of the parties should be regulated by their rights under adjustment and not under the decree.

As to the nature of the adjustment under O. 21, R. 2, see *Lodd Govindoss* v *Ramadoss* [4], *Ponnusami Nadar* v. *Letchmanan Chettiar* [5], and *Fateh Muhammad* v. *Gopal Das* [6].

1. (1904) 15 M. L. J. 370.
2. (1908) 9 M L.T. 464.
3. (1902) I. L. R 29 C. 810.
4. (1915) M W. N. 225
5. (1911) I.L.R. 35 M. 659 at p. 661.
6. (1885) I.L.R. 7 A. 424 at p. 429.

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So the question in this case is whether the decree ceases to have effect by reason of the agreement. The agreement states that unless the smaller amount of Rs. 2,500 is paid within 2 months of the decree, the decree should be executed. It is the performance of the agreement that will be the adjustment. The language of the rule is "under the decree." The rule contemplates the parties being decree-holder and judgment-debtor at the date of the agreement. If therefore it is before the decree is passed, when they are not decree-holder and judgment-debtors, it cannot amount to an adjustment of the decree. *Rama Ayyan* v. *Srinivasa Pattar* [1]. In that case, the agreement was with an intended assignee before recognition under O. 21, R. 16 as an assignee decree-holder *Yella Chetti* v. *Munisami Reddi* [2], *Ramji Pandu* v. *Mahomed Walli* [3] and *Gauri Singh* v. *Gajadhar Das* [4]. A case in which such an agreement was allowed to be proved was *Subramania Pillai* v. *Kumaravelu Ambalam* [5].

The agreement cannot be set up in the suit because it related to a state of things after the decree. *Rukmani Ammal* v. *Krishnamachary* [6], *Krishnamachariar* v. *Rukmani Ammal* [7], *Subbaraya Iyer* v. *Ramaswami Pillai* [8], *Sheo Golam Lall* v. *Beni Prasad* [9], *Thakoor Dyal Singh* v. *Sarju Pershad Misser* [10], *Durga Prasad Banerjee* v. *Lalit Mohan Singh Roy* [11]. In *Mukund Harshet* v. *Haridas Khemji* [12], there was an agreement prior to decree, not to execute it against one of the judgment-debtors and the learned judges held it was a valid agreement. The learned judges further held the agreement could only be enforced by suit; on this point it was dissented from in *Lal Das* v. *Kishore Das* [13] *Chenvirappa* v. *Puttappa* [14], is dissented from in *Rajah Ali Chowdhury* v. *Hedayet Ali Chowdhury* [15]. *Chenvirappa* v. *Puttappah* [14], dissents from *Param Singh* v. *Lalji Lal* [16], which is approved of in *Rajah Ali Chowdhury* v. *Hedayat Ali Chowdhury* [15]. In *ex parte Burden. In re Neil* [17], the Court of Appeal held that such an agreement is not opposed to public policy.

C. V. Ananthakrishna Aiyar for the Respondent.

1. (1895) I.L.R. 19 M. 230; 5 M.L.J. 218.
2. (1882) I. L. R. 6 M. 101.
3. (1889) I. L. R 13 B. 671.
4. (1909) 6 A. L. J. 403.
5. (1915) 33 I. C 66
6. (1910) M W. N. 798.
7. (1904) 15 M. L. J. p. 370.
8. (1911) 22 M.L.J 106.
9. (1879) I L. R. 5 C 27.
10. (1892) I. L. R. 20 C. 22.
11. (1897) I L R. 25 C. 86.
12. (1892) I. L.R. 17 B. 23.
13. (1896) I. L. R. 22 B. 463.
14. (1887) I. L. R. 11 B. 708.
15. (1915) 22 C. L. J. 197.
16. (1877) I. L. R. 1 A. 403.
17. (1881) 16 Ch. D. 675.

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O. 21, R. 1 contemplates payment in Court. O. 21 R. 2 contemplates cases of adjustment. They are the only modes by which a decree can be satisfied. The agreement contemplated is one subsequent to suit; and no agreement prior to decree varying the terms of the decree to be passed can control the execution of the decree to be passed; and S. 47 must be read accordingly. "Of the decree" in S. 47 contemplates the stage after the passing of the decree. The wording of O. 21, R. 16 supports my argument. In *Bhandari* v. *Ramachandra*[1] it was held that a transferee of a decree which is to come into existence in the future does not come under O. 21, R. 16. See also *Sakharam Ramchandra* v. *Govind Vaman* [2]. Under the code of 1859 there can be no stay of execution without the consent of the parties.

The terms of the decree cannot be varied by consent of the parties; and such an agreement cannot be executed. *Lodd Govindoss* v. *Ramdoss* [3]. In *Mahomed Khan Bahadur* v. *Mahomed Kunwar Sahib* [4] their Lordships do not seem to accept 19 Madras 230 and 22 Bom. 463. The agreement in question was one subsequent to the decree; and they recognised it as an adjustment. In *Annamalai Chetty* v. *Ramasami Chetty* [5] a view opposed to *Subramania Pillai* v. *Kumaravelu Ambalam* [6] has been upheld. In *Chhoti Narain Singh* v. *Musstt. Rameshwar Koer* [7] an agreement prior to decree was not upheld. The executing court should execute the decree as it is. *Udwant Singh* v. *Tokhan Singh* [8], *Hassan Ali* v. *Gauzi Ali Mir* [9], *Benode Lal Pakrashi* v. *Brajendra Kumar Saha*[10]. In *Laldas* v. *Kishoredas* [11], *Sakharam Ramachandra* v. *Govind Vaman* [2] is distinguished on the ground that under the older C. P. C., the words "stay of execution" were not there.

K. V. Krishnaswami Aiyar replied.

The Court expressed the following

Abdur Rahim, Offg. C. J.

Opinion :—*The Officiating Chief Justice* :—I would answer the question referred to the Full Bench in the affirmative. Order XXI, Rule 2 which speaks of a decree being adjusted in whole or in part assumes the existence of the decree at the time of adjustment. But it has no application to cases in which the

1. (1906) 17 M. L J. 391.
2. (1878) 10 Bom. H. C. R. 361.
3. (1915) M. W. N. 225.
4. (1908) I. L. R. 31 M. 467.
5. (1915) 33 I. C. 67.
6. (1915) 33 I. C. 66.
7. (1902) 6 C. W. N. 796.
8. (1901) I. L R. 28 C. 353 (P. C.)
9. (1903) I. L. R. 31 C. 179
10. (1902) I. L. R. 29 C. 810.
11. (1896) I L. R 22 B. p. 463.

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alleged adjustment was by virtue of an agreement entered into between the parties before the passing of the decree. See *Rama Ayyan* v. *Sreenivasa Pattar*, [1]. Then it is said that it is the duty of the executing Court to enforce the decree as it stands and it has no power to stay proceedings in execution because of an agreement made while the suit was still pending and in contemplation of a decree being passed in favour of the plaintiff. Order XX Rule 11 says that after a decree for money—which is the nature of the decree in this case—has been made, the Court can postpone payment of the amount decreed only with the consent of the decree-holder. But the Court here referred to is apparently the Court which passed the decree, and this section does not seem to define the powers of the executing Court. The powers of the Court executing a decree are laid down in section 47, the terms of which are extremely wide. It says "all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit." By a long course of decisions in this Presidency it has been held that an agreement made before the passing of the decree, by which the decree was not to be executed for a certain time, is a matter to be enquired into and decided by the executing Court. See *Rama Ayyan* v. *Sreenivasa Pattar*, [1] *Rukmani Ammal* v. *Krishnamachary*, [2] *Krishnamachariar* v. *Rukmani Ammal* [3], *Subramania Pillai* v. *Kumaravelu Ambalam*, [4]. A similar view was adopted in Bombay and in Allahabad. See *Laldas* v. *Kishordas* [5] and *Gauri Singh* v. *Gajadhar Das*, [6]. But in the Calcutta High Court a different view has prevailed. See *Benode Lal Pakrashi* v. *Brajendra Kumar Saha*, [7] *Hassan Ali* v. *Gauzi Ali Mir*, [8] *Chhoti Narain Singh* v. *Musstt. Rameshwar Koer* [9]. I am unable to hold that the very comprehensive terms of S. 47 do not include questions like the one raised before us. I may mention that the language of S. 244 of the Code of 1882, with reference to which the case in *Rama Ayyan* v. *Sreenivasa Pattar*, [5] which has been always followed in this Presidency was decided, was not perhaps as comprehensive as that of S. 47. No doubt S. 244

1. (1895) I. L. R. 19 M. 230.
2. (1908) 9 M. L. T. 464.
3. (1904) 15 M. L. J. 370.
4. (1915) 33 I. C. 66.
5. (1896) I. L. R. 22 B. 468.
6. (1909) 6 A. L. J. 408.
7. (1902) I. L. R. 29 C. 810.
8. (1908) I. L. R. 31 C. 179.
9. (1902) 6 C. W. N. 796.

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of the Code of 1882 specifically mentions 'stay of execution' as a question to be decided by the Court executing the decree, but the scheme of the corresponding S. 47 of the present Code is not to specify any particular questions at all but to include all questions relating to the execution, discharge or satisfaction of a decree as being within its scope. There is undoubtedly a great deal to be said in favour of the view taken in Calcutta and perhaps it would, in some cases, be embarassing to the executing Court to enquire into agreements made before the passing of a decree and modifying its operation. On the other hand, the Court executing the decree has been by S. 47 given such large powers that it is in quite as good a position as any other Court to decide upon controversies of this character. I do not think we should be justified in saying, as held in Calcutta, that under S. 47 questions relating to execution are necessarily confined to those arising subsequent to the decree and thus upsetting the practice which has so long obtained in this Presidency.

Seshagiri Aiyar, J.

Seshagiri Aiyar, J.—I do not propose to say much in this case. What has mainly influenced me in answering the question in the affirmative is the fact that for over 20 years this Court has acted on the principle that agreements like the one in question can be pleaded in execution proceedings. *Rama Ayyan* v. *Sreenivasa Pattar*, [1] was not disputed for a long time. It was followed in *Rukmani Ammal* v. *Krishnamachary*, [2] in *Krishnamachariar* v. *Rukmani Ammal*, [3] and in *Subbramania Pillai* v. *Kumaravelu Ambalam*, [4]. In Bombay such agreements are dealt with by the Court executing the decree, *Laldas* v. *Kishordas* [5]. So also in Allahabad, *Gauri Singh* v. *Gajadhar Das*, 6 Allahabad Law Journal 403 (three out of the four judges held that the agreement should be enquired into by the executing Court). It is true that the view of the Calcutta Judges has been uniformly and consistently against this position, *Sheo Golam Lall* v. *Beni Prosad* [6], *Thakoor Dyal Singh* v. *Sarju Pershad Misser* [7] and *Durga Prasad Banerjee* v. *Lalit Mohan Singh Roy* [8]. In this state of the law, I do not think it desirable or proper, that we should upset a practice which has been prevalent for a long period of time in this Presidency. I have always held that in matters of procedure, the principle of consistency

1. (1895) I. L. R. 19 M. 230
2. (1909) 9 M. L. T. 464,
3. (1904) 15 M. L. J. 370.
4. (1915) 88 I. C 66.
5. (1896) I. L. R. 22 B. 463 (F. B.).
6. (1879) I. L. R. 5 C. 27.
7. (1892) I. L R. 20 C. 42.
8. (1897) I. L. R. 25 C. 86.

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will conduce to justice more than a strict adherence to logic. What, after all, is the change advocated ? It is that the validity of the agreement should be separately litigated upon, and should not be enquired into in execution. This means further litigation and expense to the parties. I am therefore against overruling the long course of practice in the Presidency and the decisions commencing with *Rama Ayyan* v. *Sreenivasa Pattar* [1]. On a question of substantive law, the existence of a course of decisions may not be as effective an answer as in the case of processual law. In the latter class of cases, litigants should be enabled to rely upon a settled practice.

I, therefore, do not propose to examine the case law on the question at any length. The agreement in question is not an adjustment within the meaning of Order XXI, Rule 2. The adjustment presupposes an existing decree, *Lodd Govindass* v. *Ramdoss* [2], *Ponnusami Nadar* v. *Letchmanan Chettiar* [3], and *Fateh Muhammad* v. *Gopal Das* [4]. Therefore, the agreement is not obnoxious to Order XXI, Rule 2.

Nor is the executing Court debarred from enquiring into it by virtue of the language of S. 47. The decision in *Sakharam Ramchandra* v. *Govind Vaman*, [5] was passed with reference to the language of the Code of 1861 which in material points is different from that of the present Code.

The real difficulty arises, as pointed out by the learned Officiating Chief Justice in the course of the argument, with reference to Order XX, Rule 11. Under sub-clause (2) of that rule, the postponement of execution shall be made only on the consent of the parties. I am convinced that this consent must be subsisting at the time the executing Court is asked to pass the order; but it is open to argument whether the clause lays down that without that consent the Court has no jurisdiction to stay execution for a time. I agree that it is of the essence of the rights under a decree that a decree-holder should have prompt execution, and that the Court should have no option to put him off against his will. It may be that the effect of postponing execution will be virtually to vary the terms of the decree. These are weighty considerations in favour of the view that an agreement prior to decree which the decree-holder refuses to stand by

1. (1895) I. L. R. 19 M. 230. 2. (1915) M. W. N. 225.
3. (1911) I. L. R. 35 M 659. 4. (1885) I. L. R. 7 A. 424.
5. (1878) 10 B. H. C. R. 361.

should not be enquired into in execution, however reprehensible the conduct of the decree-holder may be in resiling from his position. If the matter were *res integra*, I would have hesitated a great deal before allowing such a course to be adopted in execution; but as I said before, no question of the substantial violation of rights is involved in holding that the question should be litigated in execution rather than by a separate suit; and as the practice has been otherwise in this Presidency, I would answer the reference in the affirmative.

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Phillips, J.

Phillips, J.—The agreement of 16th July 1914 referred to in the question of reference runs as follows:—

That the defendant should remain *ex parte* without pressing the defence, that the plaintiff should obtain a decree for the full amount, that this defendant should deposit Rs. 2,500 in the South India Bank, Tinnevelly, on or before 15th October 1914, that the plaintiff should assign the decree to this defendant or his nominee and after executing the assignment deed should recover the money from the Bank, and that the plaintiff should not transfer or execute the decree till then.

It is an agreement entered into before the decree was obtained and the question for consideration is whether it can be pleaded in proceedings taken in execution of that decree.

The first point that has to be decided is whether the agreement amounts to an adjustment of the decree within the meaning of Order 21, Rule 2, for, if it is, it cannot be pleaded as it has not been certified to Court. I think, however that the agreement does not come within the provisions of Order 21, Rule 2, for at the time it was made no decree was in existence nor could the parties be certain that any decree would be passed in the suit. The decree was not therefore adjusted by the agreement, which at most was an agreement to adjust the decree in the future.

The next point for determination is whether such an agreement can be pleaded in execution proceedings. The question has been answered in the affirmative by the Bombay High Court in *Laldas* v. *Kishordas*[1], and in the negative by the Calcutta High Court in *Chhoti Narain Singh* v. *Musstt. Rameshwar Koer*[2], *Hassan Ali* v. *Gauzi Ali Mir*[3], and *Benode Lal Pakrashi* v. *Brajendra Kumar Saha*[4]. and in this Court the views are conflicting (*Rukmani Ammal* v. *Krishnamachary*[5], and *Lodd*

1. (1896) I. L. R. 22 B. 463. 2. (1902) 6 C. W. N. 796.
3. (1903) I. L. R. 31 C. 179. 4. (1902) I. L. R. 29 C. 810.
5. (1909) 9 M. L. T. 464.

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Govindass v. *Ramdoss*[1]. The case reported in *Rama Ayyan* v. *Sreenivasa Pattar*[2] relates to an agreement after decree, and in *Krishnamachariar* v. *Rukmani Ammal*[3] the question of whether an agreement before decree can be pleaded in execution proceedings is not discussed.) In *Laldas* v. *Kishordas*[4] the cases in *Chenvirappa* v. *Puttappa*[5] and *Mukund Harshet* v. *Haridas Khemji*[6] were dissented from and Ranade, J. gave as one of the reasons for disagreeing with West J's decision in *Chenvirappa* v. *Puttappa*[5] that section 244 of the Civil Procedure Code had been since amended by the addition of the words "and stay of execution" and that the addition had not been brought to Sir C. Sargent's notice in *Mukund Harshet* v. *Haridas Khemji*[6]. These words are now omitted in the Code of 1908. It is very doubtful whether a question relating to the stay of execution of a decree can be a question relating to its execution and although in *Subramania Pillai* v. *Kumaravelu Ambalam*[7] a bench of this Court has held that the omission of the words from section 47, has no effect, because they were mere surplusages in the old S. 244, I must with all deference differ, for the words were added to S. 244 by an amendment to the Code of 1882 passed in 1888. When therefore the words were added the legislature deemed them to be of importance, and not mere surplusage. Their omission therefore from Act V of 1908 must have been deliberate, and consequently I think importance should be attached to it. However that may be, I think the matter can also be decided on another ground. The agreement sought to be pleaded could have been brought to the notice of the Court which passed the decree, and the Court might have been asked to pass a decree in accordance with its terms. The defendant allowed a decree to be passed, and, now that execution is sought, wants to go behind the decree and substitute another arrangement in its place. This does not appear to me to be a question which can be gone into by the Court executing the decree, for it impeaches the validity of the decree. It is a well settled principle for which no authority is now required that a decree must be executed as it stands, and the executing Court cannot go behind the terms of the decree. The legislature has enacted certain provisions which enable the Courts

1. (1915) M. W. N. 225.
2. (1895) I. L. R. 19 M. 230.
3. (1904) 15 M. L. J. 370.
4. (1896) I. L. R. 22 B. 463.
5. (1887) I. L. R. 11 B. 708.
6. (1892) I. L. R. 17 B. 23
7. (1915) 38 I. C. 66.

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to recognise agreements between the parties after the decree has been passed, for instance, adjustments under Order 21, Rule 2, postponement of payment or payment by instalments under Order 20, Rule 11 (2), but in order that these modifications may be enforced certain special procedure is prescribed. Again a Court has no inherent power to stay execution of a decree, and the various circumstances in which stay can be granted are duly set forth in the Civil Procedure Code. None of those circumstances exists in the present case. Otherwise under O. 21, r 17 (4), a Court shall execute a decree upon application, provided certain rules have been complied with by the applicant. For this reason there is ground for holding that the words "and stay of execution" have been deliberately omitted by the legislature with a view to excluding questions relating exclusively to stay of execution from the jurisdiction of the executing Court. A further ground for excluding an agreement like the present from consideration in execution proceedings is that the conduct of the parties amounts to an abuse of process of the Court for they have collusively induced the Court to pass a decree, which according to their agreement was never to have effect.

This seems to be a case in which the principle of *stare decisis* need not be too strictly applied, for it relates only to a question of procedure, and an alteration in procedure will not materially affect existing rights for the rights are not taken away, but the method of enforcing them is changed. Practically all the cases in which the plea was allowed in execution were decided under the Code of 1882, and now that that Code has been altered by the legislature, there appears to be no reason why, if the proper interpretation of the statute necessitates an alteration in procedure, effect should not be given to such interpretation.

I would therefore answer the question referred in the negative.

By the Court:—The answer to the question referred to us will be in the affirmative.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Burn.

Baluswami Iyer and another ... *Appellants** (*Plaintiffs*).

v.

Venkitasamy Naicken and others ... *Respondents* (*Defendants, Nos. 1 to 26 and L. Rs. of the deceased 26th and 2nd Defendants*).

Baluswamy Iyer v. Venkitaswamy Naicken.

Religious Endowments—Mutts.—Permanent lease by the head of mutt—Binding nature on successors—Matadhipathi, legal position of in relation to mutts—Trustee for the purposes of the mutt—Limitation Act IX of 1908, Art. 134—Permanent lease for a fixed rent—"Transfer for valuable consideration" within the meaning of the article—Knowledge by the transferee of the limited nature of the transferor's title, whether precludes the applicability of the article.

The head of a mutt cannot in the absence of necessity bind his successors in office by a permanent lease at a fixed rent for all time.

The head of a mutt holds the property of the mutt as a trustee for the mutt or the institution and though he has large administrative powers, this trust does exist and must be respected.

Ram Parkash Das v. *Anand Das* [1], followed.

The position of the head of the mutt enunciated in *Vidyapurana Thirtha Swami* v. *Vidyanithi Thirthaswami* [2] and *Kailasam Pillai* v. *Nataraja Thambiran* [3], is no longer good law after the decision in *Ram Parkash Das* v. *Anand Das* [1].

A permanent lease for annual rent is a transfer for valuable consideration within the meaning of art. 134 of the Limitation Act IX of 1908.

Ramaswami Mallia v. *Sri Sri Jiur Thakur* [4], *Narsayya Upada* v. *Venkatramana Bhatta* [5], followed.

Knowledge of the limited nature of the transferor's title will not dis-entitle the transferee from taking advantage of art. 134 of the Limitation Act; but it will be an important piece of evidence in judging what interest the transferee intended to take.

Ram Kani Ghosh v. *Raja Sri Sri Hari Narayan Singh Deo Bahadur* [6], followed.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Ramnad at Madura in O. S. No. 61 of 1914.

The facts are fully set forth in the judgment.

A. Krishnaswami Aiyar for the Appellant:—The first point is that a Matadhipathi is a trustee for certain public charitable and religious purposes and as such a lease by the Matadhipathi comes under Art. 134 of the Limitation Act. The second point is that the particular land in question in the case is impressed by a

* A. S. No. 52 of 1915. 19th October, 1916.

1. (1916) I.L.R. 43 C. p. 707.: 31 M.L.J 1.
2. (1904) I. L. R. 27 M. p. 435.
3. (1909) I. L. R. 33 M. p. 287.
4. (1915) I. L. R. 43 C. p. 34.
5. (1912) 23 M. L. J. p 260.
6. (1905) 2 C. L. J. p. 546.

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specific trust for Gopalakrishnaswami and the matadhipathi holds as trustee for the deity. This latter contention is borne out by Ex. L and M series which describes the holder of the properties as Gopalakrishnaswami.

On the question that a matamdhar is a trustee, the recent Privy Council Judgment in *Ram Parkash Das* v. *Anand Das* [1] lays down that a Mahant is a trustee. The referring judgment in *Kailasam Pillai* v. *Nataraja Thambiran* [2] bears out exactly that a matadhipathi is a trustee of the properties of the mutt, with large powers of discretion. *Giyana Sammandha Pandara Sannadhi* v. *Kandasami Thambiran* [3] and *Sammandha Pandara* v. *Sellappa Chetty* [4]. What seems to have weighed with the Judges in *Vidyapurana Thirtha Swami* v. *Vidhyanithi Thirtha Swami* [5] is that a Matamdhar is himself a beneficiary. It is clear in the case of private trusts, the trustee may be one of the beneficiaries. See Trusts Act, S. 3. In the case of public trusts, there is no beneficiary in the strict sense; but only the purpose is for the institution. See *Babajirao* v. *Laxmandas* [6]. The image need not even be in existence. *Bhupathi Nath Smrithi Thirtha* v. *Ram Lal Maitra* [7]. If any beneficiary is necessary, it is the institution or the deity. The manager holds the properties for the purposes of the effectuation of the charities. Otherwise a series of successive life estates will have to be admitted, which was condemned in *Gnana Sammanda* v. *Velu Pandaram* [8]. Coming to *Kailasam Pillai* v. *Nataraja Thambiran* [2], Wallis, J. refers to the indefiniteness of the purposes. If it is indefinite the result will only be that the gift to the Matadhipathi is void. At pp. 278, 279, his Lordship held that the purposes in *Sammandha Pandara* v. *Sellappa Chetty* [4] and *Giyana Sammandha Pandara Sannadhi* v. *Kandasami Thambiran* [3] are indefinite; and these cases are referred to in *Ram Parkash Das* v. *Anand Das* [1] with approval.

[*Sadasiva Aiyar, J.*—After the pronouncement of the Privy Council Judgment we need not go in detail into the decisions of this Court.]

Much more vague purposes have been upheld by the Courts as definite and charitable. Vide *In re Darling Farquhar* v.

1. (1916) I.L.R. 43 C. 707; 31 M. L. J. 1.
2. (1909) I. L. R. 33 M. 265.
3. (1887) I. L. R. 10 M. 375.
4. (1879) I. L. R. 2 M. 175.
5. (1904) I. L. R. 27 M. 435.
6. (1908) I. L. R. 28 B. 215, 223.
7. (1909) I. L. R. 37 C. 128, 138.
8. (1899) I. L. R. 23 M. 271.=10 M.L.J. 29.

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Darling [1], *In re Garrad Gordon* v. *Craigie* [2], *In re Bowles: Amedroz* v. *Bowels* [3], *Re Darling* [4]. *Paramanamdas Jivandas* v. *Venayak Rao Wassudeo* [5], *Gordhan Das* v. *Chunni Lal* [6], *Parbati Bibee* v. *Ram Baran Upadhya* [7], *Advocate General* v. *Strangman* [8], *Hari Das Bibi* v. *Secretary of State for India* [9], may be refered to for the purposes recognised as charitable.

Coming to the rule of limitation applicable to the cases of alienation by transfers, reference was made to Art. 134, of the Acts of 1871, 1877 and 1908 and the change in the language. The discussion in *Abhiram Goswami* v. *Shyama Charan Nandi* [10] was as to the applicability of Art. 134. The interpretation put by this Court on the case, was that there was a beneficial interest in the Mahant and limitation commenced only after the death of the then holder under Art. 144. This is also made clear by their Lordships in *Ishwar Shyam Chand Jiu* v. *Ram Kanwari Ghose* [11], where they held that after the amendment of Art. 134 would apply to such a case. Then there is the decision of this Court in *Narsaya Upada* v. *Venkataramana Bhatta* [12].

The case of *Abhiram Goswami* v. *Shyama Charan Nandi* [10] was distinguished on the ground of the beneficial interest in the Mahant. The case of *Muthuswamier* v. *Sree Sree Methanithi Swamiyar*[13], was under the Limitation Act of 1877 and applies the rule in *Narasaya Upada* v. *Venkataramana Bhatta*[11] on the ground of the beneficial interest of the Matadhipati. *Dattagiri* v. *Dattaraya* [14] held Art. 134 applied to the case of beneficial interest in the holder. *Rameswar Malia* v. *Sri Sri Jiu Thakur*[15] applies Art. 134 to the case of leases. This case distinguishes *Abhiram Goswami* v. *Shyama Charan Nandi* [10].

The case was one of a beneficial interest in the Shebait.

In *Perumal Gramani* v. *Mahamad Kasim Sahib*[16] (S.A. 299 of 1914) it was held that there can be no award of improvements against a trustee.

1. (1896) 1 Ch. 50.
2. (1907) 1 Ch. 382.
3. (1902) 2 Ch. 652.
4. (1908) A. C 347.
5. (1878) I. L. R. 7 B. 19.
6. (1907) I. L. R. 30 A. 111.
7. (1904) I. L. R. 31 C. 895.
8. (1904) 6 Bom. L. R. 56.
9. (1879) I. L. R. 5 C. 228.
10. (1909) I L.R. 36 C. 1003 at 1008
11. (1911) I. L. R. 38 C. 526. P. C.
12. (1912) 23 M. L. J. 260.
13. (1913) I. L. R. 38 M. 356.
14. (1902) I.L. R. 27 B. 363.
15. (1915) I. L. R. 43 C. 34.
16. (1914) 28 I. C. 340.

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T. Narasimha Aiyangar for the Respondents :—That there is no specific trust is clear on the evidence.

(*Sadasiva Aiyar, J.*—We are with you that there is no difference between the properties of the Mutt and that of Gopalakrishnaswamy kept up).

Till the decision of the Privy Council in *Ram Parkash Das* v. *Anand Das* [1], the prevailing view in this court was that a Matadhipati is a corporation sole. He has a beneficial interest in the properties. We have to see whether the case of the Privy Council has made a difference. *Sammanda Pandara* v. *Sellappa Chetty* [2] traces the origin of the Mutts. It appears in the report of the Privy Council in *Ram Parkas Das* v. *Anand Das* [1], that the statement of the law was not disputed at all. The argument wholly proceeded on facts and the case proceeds wholly on the usage of the particular asthal.

My submission is that a Matadhipati is the absolute owner of all the incomes for his life. All alienations by the Matadhipati are valid for his life so long as the purposes of the Mutt are carried on by income from the remaining properties. *Ambalavana Desikar Pandara Sannadhi* v *Bappu Rao Jagadap* [3].

In the absence of good faith on the part of the permanent lessee Art. 134 cannot apply. *Tholasinga Mudali* v. *Nagalinga Chetty* [4], *Singaram Chettiar* v. *Kalyanasundaram Pillai* [5].

C. V. Ananthakrishna Aiyar (with *B. Sitarama Rao*) for the other Respondents.

Ram Parkash Das v. *Anand Das* [1] has only reference to the usage of the institution with regard to the appointment. As a matter of fact, the question of law was admitted by Counsel; and we do not find the case of *Vidhyapurana Thirthaswami* v. *Vidhianidhi Thirthaswami* [6] referred to at the bar.

When the permanent lease by a trustee is void and rent is paid under it, it is deemed to be tenancy from year to year. See *President and Governors of Magdalen Hospital* v. *Knotts* [7] per Lord Selbourne. See also *Abhiram Goswami* v. *Shyama Charan Nandhi* [8] and *Ecclesiastical Commissioners* v. *Merral* [9]. The case in *President and Governors of Magdalen Hospital* v. *Knotts* [7]

1. (1916) I.L.R. 43 C. 707.
2. (1876) I L. R. 2 M. 175.
3. (1899) 9 M.L. J. 93.
4. (1915) 3 L. W. 19.
5. (1914) 1 L. W. 687.
6. (1904) I. L. R. 27 M. 435.
7. (1879) L. R. 4 A. C. 324.
8. (1909) I.L.R. 36 C 1003 at 1008.
9. (1869) 4 Exch. 162 at 166.

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was cited before the learned Judges in *Narsya Upada* v. *Venkataramana Bhatta* [1]. The case of *Narasimhachari* v. *Gopala Aiyangar* [2] holds the alienation is good for the life of the alienor.

A. Krishnaswami Aiyar in reply :—After the passing the Limitation Act of 1877 and 1908, the question of "good faith" is quite immaterial under Art. 134. The decision of Ayling and Srinivasa Aiyangar, JJ. in A.S. No. 13 of 1916 is an authority for the position; there the question has been fully discussed.

The same view has been upheld in *Prasanna Venkatachela Reddiar* v. *Srirangammal* [3].

The cases in *Singaram Chettiar* v. *Kalyanasundaram Pillai* [4], *Tholasinga Mudali* v. *Nagalinga Chetty* [5], are both cases of mortgages. In *Radhanath Doss* v. *Gisborne* [6] "purchaser" was held to be a purchaser on a representation that the mortgagee is an owner.

In the acts of 1859 and 1871, "good faith" and "purchase" were present in Art. 134. The Act of 1877 retained "purchase." Both the terms have been taken away under the Act of 1908.

The case in *Maniklal Atmaram* v. *Manchershi Dinsha Coachman* [7] lays down that actual fraud must be made out. Also *Gisborne and Co.* v. *Radhanath Doss* [8]. *Attorney General* v. *Davey* [9]. was a case under the Statute 3 and 4 William IV Ch. 27. See 25 Lightwood p. 68. *President and Governors of Magdalen Hospital* v. *Knotts* [10], lays down that notice is immaterial. Also *Sailendra Nath Mitter* v. *Karali Charan Singh* [11].

The case of *Ambalavana Desika Pandara Sannadhi* v. *Bappu Rao Jagadap* [12] has been overruled in almost all the points decided. If Art. 134 does not apply Art. 144 must apply.

The Matadhipathi is only one of the objects or beneficiaries of the charity and there is no reason why one of them should alienate the property to the prejudice of the other objects for his life time. So limitation runs from the date of possession taken under the alienation.

The case of *Narsya Upada* v. *Venkataramana Bhatta* [1] is against the view that payment of rent under an invalid lease

1. (1912) 23 M. L. J. 260.
2. (1905) I. L. R. 28 M. 391.
3. (1914) 26 M. L. J. 537.
4. (1916) I.L. R. 43 C. 707.
5. (1915) 3 L. W. 19.
6. (1871) 14 M. I. A. 1.
7. (1876) I. L.R. 1 B. 269.
8. (1866) 5 W. R. 253.
9. (1859) 4 De G. & J. p. 136, 54 E. R. 56 at 67.
10. (1879) 4 A. C. 324.
11. (1905) 2 C. L.J. 546.
12. (1899) 9 M. L. J. 93.

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makes the lessee, a tenant from year to year, and expressly disapproves the observations of Lord Selbourne.

The Court delivered the following

Judgment:—*Burn, J.*—The facts of this case, as far as it is necessary to state them, are as follows;—On 17th March 1891, 2nd plaintiff obtained a permanent lease Exhibit A of certain land within the limits of Madura town from the Matathipathi of Sri Vyasaraya Mutt the seat of which is in the state of Mysore. 2nd plaintiff was a near relative of the grantor. The rent reserved was a fixed sum of Rs. 24 per annum. The grantor died shortly after the execution of Exhibit A. His successor held office till 1906 when 26th defendant became head of the Mutt. In 1902, 2nd plaintiff sublet (Exhibits D and D 1) to 1st defendant for a period of ten years and in 1905, 2nd plaintiff and his son 3rd plaintiff sold their rights under Exhibit A to 1st plaintiff (Exhibit E). From 1905 the properties controlled by the heads of the mutt were managed by the Diwan of Mysore under powers of attorney executed by the Matathipathis and the Diwan in turn empowered defendants' 1st witness to conduct the management. In 1908 defendant's 1st witness visited Madura and it was then only that he became aware of the nature of the lease granted to the 2nd plaintiff. He at once objected to it and tried to induce 1st defendant to attorn to him. This 1st defendant at that time refused to do. In November 1911 however 1st and 2nd defendants took a lease of the land for 17 years from defendant's 1st witness. (Exhibit V). At the end of September 1912, the term fixed in the lease deed Exhibit D, expired. The rent for the whole period had been paid in advance. 1st and 2nd defendants are admittedly in possession of the land and claim to hold it under Exhibit V. In 1908 defendant's 1st witness objected to the lease of 1891 on the ground that it was not competent to the head of the mutt to grant a permanent lease of the kind. He tried to get 1st plaintiff to come to terms but in vain. Certain payments were made by 1st plaintiff after 1908 and the effect of these is a subject of controversy between the parties. 1st plaintiff seeks (amongst other reliefs) a declaration that he is the permanent lessee of the property and a direction to the defendants to deliver up possession of it.

The main contentions on behalf of 1st plaintiff are (1) that the permanent lease is binding on the grantor and his successors, (2) that a valid title has been acquired under the provisions of

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the Limitation Act and (3) that the defendants are estopped from denying the 1st plaintiff's title. The findings of the learned Subordinate Judge are against the plaintiff's appellants on all three points.

With regard to the first point there is no doubt that the head of a mutt cannot in the absence of necessity bind his successors in office by a permanent lease at a fixed rent for all time. This would be so, even if the rent had been adequate in 1891 (*Maharanee Shibessource Debia* v. *Mothooranath Acharjo*, [1]) There is no allegation much less proof of any such necessity. The first contention must be rejected.

In connection with the second point a question arises as to the nature of the endowment and the position of the head of the mutt in relation to it. The exact terms of the original grant are not in evidence. It was conceded in argument that the grant was made by one of the Naicken dynasty of Madura. The case for the appellants is that the endowment was for a specific purpose *i.e.*, for the worship of Gopalakrishnaswami who is described by the defendant's 1st witness as the "titular deity of the mutt." The evidence does not support this contention and it has been found against in the Lower Court. A statement made by a local agent of the mutt during the Inam Commission inquiries is relied upon for the appellants. It was apparently unsupported by any documentary evidence. The description of the Inam as given at the close of the inquiry is that it was granted "for the support of Vysaraya Madam" (Exhibit L); compare also description in Exhibit F. The evidence for the defendants is that the income from this property is not appropriated to any particular purpose but forms part of the general funds of the mutt. I think the grant must be held to have been made for the general purposes of the mutt.

What then is the position of the head of the mutt in relation to the general endowments of the institution? In *Sammanda Pandara* v. *Sellappa Chetty* [2], there is a description of "the nature of the generality of such institutions and the incidents of the property which is devoted to their maintenance". The property is stated to be "in a certain sense trust property; it is devoted to the maintenance of the establishment but the superior has large dominion over it, and is not accountable for its management nor for the expenditure of the income, provided he does not

1. (1869) 13 M. I. A. 270. 2. (1879) I. L. R. 2 M. 175.

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apply it to any purpose other than what may fairly be regarded as in furtherance of the objects of the institution."

In *Gyanasammanda Pandarasannadhi* v. *Kandasami Tambiran* [1] a description is given of how the endowments of mutts were acquired and this description appears to fit the case now under consideration in so far as the facts have been ascertained. The judgment then proceeds to lay down that the head of the mutt came to own its endowments "in trust for maintenance of the mutt for his own support for that of his disciples and for the performance of religious and other charities in connection with it according to usage."

In *Vidyapurna Tirthaswami* v. *Vidyanidhi Tirthaswami* [2], a different view was taken as to the position of the head of the mutt towards its endowments. It is this ruling which forms the basis of the judgment of the Lower Court on the point now under consideration. The question was again examined by a Full Bench in the case reported in *Kailasam Pillai* v. *Nataraja Thambiran* [3]. As I read the judgments in the last mentioned case it was held that no general rule could be laid down and that each case must be judged on the particular facts. Sankaran Nair, J. appears to accept the statement of the law in *Gyanasammanda Pandarasannadhi* v. *Kandasami Tambiran* [4], as strictly accurate with regard to the endowments there referred to (Vide *Kailasam Pillai* v. *Nataraja* [5]) which seem to me similar in kind to the endowment now in question.

It is not in my opinion necessary to discuss these cases in detail because in my opinion the matter is now governed by the decision of the Privy Council reported in *Ram Perkash Das* v. *Anand Das* [6]. The nature of the interest of the head of a mutt in the mutt property is declared in clear terms. "The whole assets are vested in him as the owner thereof in trust for the institution itself" (page 713), again at page 714, "the nature of the ownership is, as has been said, an ownership in trust, for the mutt or institution itself, and it must not be forgotten that although large administrative powers, are undoubtedly vested in the reigning mahants this trust does exist and must be respected." And at page 732 in referring to the retirement of the head of the mutt it is said, 'the mahant in their Lordships' opinion is not only a spiritual preceptor, but also a trustee in respect of the *asthal*

1. (1887) I.L.R. 10 M 375 at 386. 2. (1904) I. L. R. 27 M. 435.
3. (1909) I. L. R. 33 M. 265. 4. (1887) I. L. R 10. M. 386.
5. (1909) I. L.R. 33 M. at page 287. 6. (1916) I. L.R. 43 C. 707.: 31 M. L.J. 1.

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over which he presides." Their Lordships seem to me to lay this down as a rule of general applicability for whereas in the matter of succession to the headship the usage and custom of a mutt have to be considered in each case. This is expressly stated. It is true that the point to be decided in the case related to the office of Superior of the Mutt and not to the management of the other property and that the latter decision of this court does not seem to have been referred to. The judgment however opens with a considered pronouncement as to the position of a head of the mutt as to his functions and the legal position with regard to the endowments. The fact that certain decisions of this court may not have been referred to does not make the ruling any the less binding.

There do not appear to be any circumstances peculiar to the present case, which would exclude it from the operation of the general rule. It seems to me therefore that the sole beneficiary is the mutt. This is not an instance in which there is any individual interest in the head of the mutt independently of the institution itself. He is no doubt entitled to appropriate part of the income to his own maintenance on account of his position in the mutt but his rights in this respect are the same in kind as those of others connected with the mutt who are entitled to be supported from its funds. In this view it is unnecessary to consider the bearing on the question of limitation of the cases where it has been held that the head of the mutt had a personal interest in the property alienated. (*Eg. Abhiram Goswami* v. *Shyama Charan Nandi*,[1] and *Narsaya Upada* v. *Venkataramana Bhatta*,[2].) The decision in *Muthusamier* v. *Sree Sreemethantithi Swamier*,[3] proceeds on the footing that the position of the head of a mutt is that enunciated in *Vidyapurana Thirtha Swami* v. *Vidyanidhi Tirthaswami*,[4] but as already stated this view appears to be overruled by the decision of the Privy Council.

I think therefore that the alienor held the property simply as a trustee. It has been held in *Ramaswami Mallia* v. *Sri Sri Jiur Thakur*[5] that a permanent lease is a transfer within the meaning of Article 134 of the Limitation Act of 1908. The same decision and that reported in *Narsaya Upada* v. *Venkataramana Bhatta*,[2] are authorities for holding that the annual

1. (1909) I. L. R. 36 C. 1003.
2. (1912) 23 M. L. J. 260.
3. (1913) I. L. R. 38 M. 356.
4. (1904) I. L. R. 27 M. 435,
5. (1915) I. L. R. 48 C. 84.

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rent is a valuable consideration. The requirements of the article would therefore seem to be fulfilled.

It has however been urged that the appellants are not entitled to take advantage of the article because 2nd plaintiff was aware at the time he obtained the lease of the position of his lessor; the plaint alleges that the mutathipathi was a trustee and 2nd plaintiff in his evidence describes him as a trustee merely. There is nothing in the actual wording of S. 10 of the Act or in Article 134 to support the contention. It is however argued that this has been held to have been the meaning of the provision in the Act of 1877, and that these rulings are not affected by the changes in wording made in 1908. Vide *Tholasinga Mudali* v. *Nagalinga Chetty* [1]. The rulings relied on appear to rest on the remarks of Lord Cairns in delivering the judgment of the Privy Council in *Radanath Doss* v. *Gisborne* [2]. In that case the actual finding was that the transaction was consistent with the view that the alienee intended to take only such interests as the transferor was competent to alienate (*vide* pp. 17 and 19). This decision has been explained by Mookerjee, J. In *Ram Kani Ghose* v *Raja Sri Hari Narayan Singh Deo Bahadur* [3] and quite recently by Ayling and Srinivasa Aiyangar, JJ. in Appeal No. 13 of 1916. In the latter case the later rulings of this Court have also been considered and distinguished. The fact of knowledge may be an important piece of evidence, in judging of what interest the transferee contracted to take especially where (as in most of the cases cited) the transferor was a mortgagee but such knowledge cannot by itself disentitle the transferee to the benefit of Article 134 of the Act. In the present case I entertain no doubt that it was the intention of the grantor to create a permanent lease and that 2nd plaintiff intended to take and did take the lease as a permanent one. His subsequent dealings with the property support this view. The grantor died a few months after the execution of Exhibit A. During the fourteen years that his successor held office the 2nd plaintiff continued to hold on the terms of the lease deed. I would respectfully follow the view enunciated by Mookerjee, J. in the case referred to and hold that the 2nd plaintiff perfected his title to a permanent lease as more than twelve years elapsed since the

1. (1916) 3. L. W. 19. 2. (1871) 14 M. I. A. 1.
3. (1905) 2 C. L. J. 546.

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grant. The lessor intended to grant and the lessee intended to acquire an interest greater than the transferor was competent to alienate and all the requirements of article 134 have been complied with.

The above finding is sufficient for disposal of the appeal and it is therefore unnecessary to consider the question of estoppel which is raised by the appellants.

The Subordinate Judge has given the 1st plaintiff a decree for Rs. 116-6-6 as damages against the 1st defendant. A memorandum of cross objections was filed but was not pressed and is dismissed.

There is a further claim for Rs. 500 as damages for breach of the agreement in Exhibit D prohibiting the letting of trees for tapping in the last two years of the lease. The Subordinate Judge recorded no finding on the point as he considered the claim unsustainable for reasons given in paragraph 29 of his judgment. The evidence adduced is of a very vague description and in my opinion insufficient to enable a conclusion to be come to as to whether any and if so, what amount, is due to the 1st plaintiff on this account.

In the result I think the appeal should be allowed and 1st plaintiff given a decree for possession of the property, and a declaration that he is a permanent lessee. He will also be entitled to mesne profits from 1st October 1912, till delivery. These profits will be recoverable from defendants Nos. 1 and 2 and will be determined by the Lower Court and embodied in a supplemental decree. Having regard to the uncertainty of the law in this Presidency prior to the judgment of the Privy Council, I think the parties should bear their own costs in both courts.

Sadasiva Aiyar, J.:—I agree.

C. A. S.

PRIVY COUNCIL.

Present:—The Lord Chancellor (Lord Buckmaster), Lord Shaw, Lord Wrenbury and Mr. Ameer Ali.

[On Appeal from the High Court at Madras.]

D. T. Keymer ... *Plaintiff** (*Appellant*)

v.

P. Viswanatham Reddi ... *Defendant* (*Respondent*).

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Keymer *v.* Viswanatham Reddi.

Foreign judgment—Judgment on the merits of the case—Foreign judgment in favour of plaintiff on defendant's omitting to answer interrogatories—Not a judgment on the merits—Not enforceable in India—Code of Civil Procedure, 1908, *S.* 13 (*b*).

Where a plaintiff was given liberty in an action before the High Court of Judicature in England to exhibit interrogatories and on the defendant's omitting to answer such interrogatories his defence was struck out and plaintiff allowed to sign judgment against him.

Held, that such judgment was not a judgment "given on the merits of the case" within the meaning of S. 13 of the Code of Civil Procedure 1908 and that in consequence no action could be maintained on it in the Indian Courts.

S. 13 (b) of the Code of Civil Procedure refers to those cases where the controversy raised in the action has not been the subject of direct adjudication by the Court.

Appeal from a decree of the Madras High Court, dated November 6, 1914, reversing a decree of Bakewell, J.

The facts of the case are sufficiently set out in their Lordships' judgment. Plaintiff sued upon a judgment of the King's Bench Division and his suit was decreed by Bakewell, J., but on appeal dismissed by the Appellate Bench of the Madras High Court (Wallis, C. J. and Seshagiri Aiyar, J.) See [27 M. L. J. 670] for a report of the case on the ground that the judgment was not a decision on the merits.

Hence this appeal.

Sir R. Finlay K. C., Dunne with him for Appellant:—

The trial Judge has rightly held that the suit was decided on the merits. "Judgment on the merits" means "judgment on the facts in contention between the parties". The "merits of the case" are the facts that compose the issue on the principal question in the case. The question here was whether the defendant owed certain money. In a similar case in the Punjab, when defendant was served with a writ of summons issued by the High Court in England and failed to enter an appearance, the judgment

* 13 and 14th November, 1916.

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passed against him was held to be a judgment on the merits. *Ram Chand* v. *Bartlett* [1].

[*The Lord Chancellor* :—That is not the same as holding on the facts. If a man's case is dismissed because he is in contempt that is not a decision on the merits].

That would be a punishment, but here, on the authority of the Statute, he is put in the same position as if he had not defended. There is no difference between the Courts holding that a defence is a sham defence and in their taking evidence and disbelieving it. Here defendant put in a defence but would not give the Court the materials for holding whether such defence was true.

[*The Lord Chancellor*.—Take the case of a holder of a bill. Signature denied. Holder knows nothing of the signature. Defendant refuses to answer interrogatories on the point and his defence is struck out. How can you say there has been an adjudication on the merits ?]

It is a matter of presumption. I say that a defendant whose defence is struck out is in the same position as a defendant who has made no defence at all.

Reference was made to the following:—*The Delta* [2], *The Challenge* [3], *Haigh* v. *Haigh* [4], *Farden* v. *Richter* [5].

Dunne followed, S. 13 of the Code of Civil Procedure is part of the law of *res judicata* and places a foreign judgment on the same footing as others, provided it is given " on the merits ". A judgment passed against a man who makes a defence but withdraws it is exparte, but still it is on the merits : and if, as here, a man puts himself in a position where he is left without a defence, the adjudication is similarly on the merits. " Merits " here means " merits of the case before the Court at the time of adjudication ".

[*Lord Wrenbury*.—Every judgment is that].

It is the merits of the case so far as presented to the Court.

Sir Robert Finlay, K. C., asked leave to cite some further cases. This was allowed and Counsel referred to *Harris* v. *Quire* [6], *In re Henderson* : *Nouvion* v. *Freeman* [7], *Nouvion* v. *Freeman*, [8].

1. (1909) 44 P. R 268, 282.
2. (1876) 1 P. D. 393, 401.
3. (1904) P. D. 41.
4. (1885) 31 Ch. D. 478.
5. (1889) 23 Q. B. D. 124.
6. (1869) L. R. 4 Q B. 653, 658.
7. (1887) 37 Ch. D. 244 C. A.
8. (1889) 15 A. C. 1.

L. De Gruyther, K. C., and *Kenworthy Brown* for Respondents were not called on.

Their Lordships' judgment was delivered by

The Lord Chancellor:—This case raises only a short question, but admittedly it is one of wide and general importance. It is for that reason that the Board departed from their usual course, and permitted Sir Robert Finlay to resume his argument after it had been concluded and his junior had addressed the Board. After having given full consideration to the arguments urged both by him and by his junior, the Board find themselves unable to accede to his contention.

The history of the case is this: The appellant was originally plaintiff in a suit brought by him in this country against the respondent. In that suit he claimed a sum of 425*l.* 17*s.* 2*d.*, which he said was due to him from the respondent in these circumstances: The plaintiff is an Indian merchant carrying on business in London. The defendant, he alleged, was a member of a certain firm of traders who traded in Madras. The plaintiff asserted that he had entered into an arrangement with the firm, of which the defendant was a member, under which the firm were to consign to him, the plaintiff, goods for sale in London; they were to be sold on a certain commission, this commission and expenses were to be deducted, and the net proceeds were to be remitted back to India. As against those proceeds, it was also arranged that the defendant should be at liberty to draw bills to the extent of 75 per cent. The plaintiff asserted that bills were so drawn; that he accepted them, and that ultimately it was found that these bills exceeded the amount of the proceeds for which he was properly accountable by the sum of 425*l.* 17*s.* 2*d.*, and for that sum he brought his suit. His statement of claim set out these facts, and to that claim a defence was delivered by the respondent, who denied that he ever was a partner in the firm with whom, and with whom alone, it was asserted that the transaction had been made. He also denied in less explicit terms that there was any money due, or that the arrangements had been made under which the plaintiff asserted that his claim arose. Upon this defence being put in, the plaintiff applied for liberty to exhibit interrogatories. That liberty was granted, and interrogatories were exhibited calling upon the defendant to speak as to some of

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the material matters in dispute. Those interrogatories the defendant omitted to answer and thereupon an application was made to the Court, asking that the defence might be struck out and judgment entered for the plaintiff in the action. That judgment was accordingly given on the 5th May, 1913, and it is in these terms: "It is ordered upon the application of the plaintiff that the defendant's defence herein be struck out, and that the defendant be placed in the same position as if he had not defended, and that the plaintiff be at liberty to sign judgment for 425*l*. 17*s*. 2*d*., the amount claimed herein, and his costs of this action to be taxed;" and then judgment goes for the 425*l*. 17*s*. 2*d*.

Upon that judgment the appellant sued the respondent in Madras. The respondent set up by way of defence the statement that the judgment between him and the plaintiff in the English Courts had not been a judgment given upon the merits of the action, and that consequently by virtue of S. 13, Sub-Section (*b*), of the Indian Code of Civil Procedure, 1908, the action could not be maintained on the judgment alone in the Indian Courts, and that the merits would have to be investigated.

The question as to whether that defence is well established depends upon considering what are the terms of S. 13 of the Code of Civil Procedure, and what is the meaning of the phrase there contained as to a judgment given "on the merits of the case." S. 13 begins by a general provision that foreign judgments shall be conclusive as between parties to the litigation. It is in these terms: "A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title." But to that general provision there are certain definite exceptions, and one of them is as follows: "Except where such judgment has not been given on the merits of the case."

The whole question in the present appeal is whether, in the circumstances narrated, judgment was given on the 5th May, 1913, between the parties on the merits of the case. Now if the merits of the case are examined, there would appear to be, first, a denial that there was a partnership between the defendant and the firm with whom the plaintiff had entered into the arrangement; secondly, a denial that the arrangement had been made; and, thirdly, and a more general denial, that even if the arrangement

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had been made the circumstances upon which the plaintiff alleged that his right to the money arose had never transpired. No single one of those matters was ever considered or was ever the subject of adjudication at all. In point of fact what happened was that, because the defendant refused to answer the interrogatories which had been submitted to him, the merits of the case were never investigated and his defence was struck out. He was treated as though he had not defended and judgment was given upon that footing. It appears to their Lordships that no such decision as that can be regarded as a decision given on the merits of the case within the meaning of S. 13, Sub-Section (*b*). It is quite plain that that sub-section must refer to some general class of cases, and Sir Robert Finlay was asked to explain to what class of case in his view it did refer. In answer he pointed out to their Lordships that it would refer to a case where judgment had been given upon the question of the Statutes of Limitation, and he may be well founded in that view. But there must be other matters to which the Sub-Section refers, and in their Lordships' view it refers to those cases where, for one reason or another, the controversy raised in the action has not, in fact, been the subject of direct adjudication by the Court.

In the circumstances that happened here, it is in their Lordships' view impossible to hold that the merits of this case were ever the subject of adjudication, and therefore they think that this appeal must fail. They will therefore humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellant :—*Reynolds and son.*

Solicitors for respondent :—*John Josselyn.*

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PRIVY COUNCIL.

Present (at the final hearing on the last three dates) :—Lord Parker of Waddington, Lord Sumner and Sir Lawrence Jenkins.

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[On Appeal from the High Court of Judicature at Fort William.]

Ram Narayan Singh ... *Defendant* Appellant.*

v.

Adhindra Nath Mukherji and others ... *Plaintiffs Respondents.*

Right to sue mortgagor for mortgage-money—Mortgage not enforceable as such, but accompanied by possession—personal liability of mortgagor, how affected by provision for repayment in a particular manner—Can such liability arise from

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* April 7, May 12, July 28, October 26, 27, November 16, 1916.

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wrongful acts of mortgagor preventing realization of security—Transfer of Property Act (Act IV of 1882) Ss. 59, 68—Practice—Non-appearence of respondent in Privy Council due to fraud of agent—Ex parte *decree—Setting aside of—Reinstatment of appeal.*

The plaintiffs were put in possession of certain villages under a usufructuary mortgage-deed providing for the payment of Rs. 1,30,000 with interest. On the expiry of the period limited in the deed they gave up possession. Thereafter they sued alleging that owing to wrongful acts of the mortgagor they had failed to realize a large part of their debt, and claiming a mortgage-decree for the balance or alternatively a simple money-decree.

Held, that the nature and terms of the deed were such as to show that it was not originally intended that the mortgagor should be personally liable, but that such liability might have arisen subsequently under S 68 of the Transfer of Property Act. The case was remitted for further trial to allow the respondents an opportunity of proving their allegations as to wrongful acts of the mortgagor, and of establishing that such acts rendered him personally liable.

Per Curiam, In considering the question whether a mortgagor is personally liable it must be borne in mind(1)that a loan *prima facie* involves such a personal liability: (2) that such liability is not displaced by the mere fact that security is given for the repayment of the loan with interest: but (3) that the nature and terms of such security may negative any personal liability on the part of the borrower. It must also be borne in mind that even if the mortgagor be in the first instance under no personal liability, such liability may arise under S. 68 (*b*) or (*c*) of the Transfer of Property Act.

The appeal was originally allowed *exparte*. The respondents subsequently petitioned for its reinstatement, on the ground that they had been debarred from appearing by the fraud of their agent, who had misappropriated the moneys entrusted to him to enter appearance with. The appeal was reinstated the costs of the hearing thrown away being reserved.

Appeal from an order of the Calcutta High Court, setting aside a preliminary decree of the Subordinate Judge of Hazaribagh.

Maharaja Nam Narayan Singh father of appellants, borrowed Rs. 1,30,000 from Rai Babu Jadu Nath Mukherji father of respondents, and in consideration thereof gave him a (Zarbharna) usufructuary mortgage deed providing for the repayment of the loan with interest out of the rents and cesses of certain villages. The deed was not attested as required by S. 59 of the Transfer of Property Act (IV of 1882). Possession of the villages was given to the mortgagee in terms of the deed, and on the expiry of the period limited therein was restored to the mortgagor. Nearly six years later respondents sued the appellants for a sum of Rs. 1,57,915 balance alleged by them to be due. They admitted that the deed effected no mortgage, but claimed that it created a charge within the meaning of S. 100 of the Transfer of Property Act. They alleged that by sundry wrongful acts of the mortgagor they had been prevented from collecting rents and otherwise

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realising their security, and prayed (*a*) for a mortgage decree (*b*) alternatively for a simple money-decree against appellant to be realised out of his deceased father's assets which had come to his hands.

Appellant denied liability and pleaded limitation. The Subordinate Judge held that the deed created no charge as contended by plaintiffs: but he assumed, rather than decided, that the executant was personally liable and that respondents could "come on the basis of breach of contract." The principal contest before him was whether such personal liability was barred by limitation; he held that it was not, and gave plaintiffs a preliminary decree, referring to a commissioner to decide how much was due. On appeal by defendant the High Court (Carnduff and Ashutosh Mookerjee, JJ.) upheld this judgment on other points, but remitted the rest of the case to the Subordinate Judge himself. On the question of the mortgagor's personal liability, which was one of the grounds of appeal, they observed that the unqualified admission of indebtedness contained in the deed was equivalent to an express covenant and created a personal obligation, and that though a mode of payment was prescribed in the deed, the creditor was not limited to that mode alone.

Defendant appealed to the Privy Council.

The appeal was originally heard *exparte* (by Lord Shaw, Lord Sumner, Sir John Edge, and Mr. Ameer Ali) and allowed on the ground that no personal liability of the mortgagor was established. Their proceedings are reported at 31 M. L. J. 251. The Board's Judgment sets out the material parts of the deed.

Thereafter respondents petitioned for a rehearing, alleging that they had been prevented from appearing by the fraud of one W, to whom they had paid moneys at Calcutta on his false allegations that he represented a well known firm of English Solicitors and would take necessary steps in England, but who had disappeared with the money. The petition was heard by the Lord Chancellor (Lord Buckmaster) Viscount Haldane, Lord Atkinson, Lord Shaw and Lord Parmoor, *Sir Robert Finlay K. C.* and *Mr. J. M. Parikh* appearing for petitioners and *Mr. De Gruyther, K. C.* and *Mr. Dube* for the appellants. The facts were not disputed. The Board ordered that the appeal be restored, subject to the respondents paying the costs of the hearing, thrown away.

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At the second hearing.

De Gruyther, K.C. for appellant, submitted that the personal liability of the mortgagor was sought to be established in a mortgage suit based on the bond, but that the bond did not create any such liability: it provided a mode of repayment by collecting rents, and threw upon the mortgagee the risk of the collections proving insufficient.

(*Lord Parker.* The mortgagee has no remedy unless he is paid in a certain way.)

It cannot be contended that because the deed is invalid as a mortgage, the personal liability is not excluded by it. Both parties have acted on the deed, and as between them its provisions are binding in equity.

Mahomed Musa v. *Aghore Kumar Ganguli* [1].

The personal liability of the mortgagor under the bond, even if it exists, is barred after 6 years: Art. 116 of Schedule I of the Limitation Act (IX of 1908).

The true cause of action is not on the bond, but on the alleged wrongful acts of the mortgagor subsequent thereto. Any suit based on such wrongful acts is long since barred.

Dube followed. Even if plaintiffs have a cause of action, they cannot succeed in this suit; the action is bad as framed.

Sir Robert Finlay, K.C. and *J.M. Parikh* for respondents:—No cause has been shown to disturb the order appealed against. The wrongful acts alleged in the plaint bring S. 68 of the Transfer of Property Act (IV of 1882) into operation. They make the mortgagor personally liable even if he were not so liable before. The mortgagor's agent made a written acknowledgment of liability on 28th December 1903; this saves limitation by virtue of S. 19 of the Limitation Act.

(*Sir Lawrence Jenkins* referred to S. 20).

Limitation may also be saved by that section, as rents have been collected right down to 1908.

De Gruyther, K. C. in reply; The admission of debt contained in the acknowledgment relied upon referred only to the obligation under the bond and did not create any obligation to pay in other than the stipulated manner.

1. (1914) L. R. 42 I.A. 1=28 M. L. J. 548.

Kalka Singh v. *Parasram*[1].

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Their Lordships' judgment was delivered by

Lord Parker of Waddington.—This is the rehearing of an appeal from the High Court at Calcutta, dated the 30th August, 1911, which set aside a preliminary decree of the Subordinate Judge and remitted the case to the Court of the Subordinate Judge to be dealt with in accordance with certain directions contained in the judgment of the High Court. At the original hearing the present respondents did not appear and the appellant obtained an order setting aside the decree of the High Court at Calcutta and dismissing the action in which the appeal arose. Subsequently the respondents obtained an order of His Majesty discharging the order thus made, on the ground that it was by the fraud of his agent that he was not represented by counsel at the hearing, and directing the appeal to be reheard, the costs thrown away to be dealt with upon such rehearing. The appeal has accordingly been reheard before their Lordships, who have had the advantage of hearing counsel on both sides.

The facts out of which this action arose may be stated as follows: In the year 1896, Maharajah Sri Sri Ram Narayan Singh Bahadur (whom their Lordships will hereafter refer to as the mortgagor) executed in favour of Rai Jadu Nath Mukerji Bahadur (whom their Lordships will hereafter refer to as the mortgagee) a deed dated the 14th April in that year. This deed recites that the mortgagor had borrowed from the mortgagee a sum of 130,000 rupees, and for the repayment of the loan with interest, as therein mentioned, had given in Zarbharna the rents and cesses of the mokurari villages therein described. The villages are divided into groups, the distinguishing mark of each group being the date at which the mortgagee is to take possession. The possession of all the villages is to be redelivered to the mortgagor on the 14th January, 1903, it being calculated that by that date the amount due to the mortgagee for principal and interest will have been satisfied out of the rents of the several villages. The deed contains an elaborate schedule showing the details of the calculation. It also expressly precludes

1. (1894) 22 I. A. 68 at p. 75.

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the mortgagor collecting any of the rents during the term of the Zarbharna. It also contains the following clause:—

"If by mistake I" (the mortgagor) "or my heirs make any collection, then "I or my heirs shall be liable to pay the amount collected with interest at the "above rate ....Except in such a case, for no other reason and on no other "account, the Zarbharnadar has and shall have any claim whatever against me "or my heirs and representatives on the ground of realisation and non-realisation. "If a claim is made, it is and shall be totally null and void."

It is common ground that the mortgagee obtained possession of the several groups of villages at the respective dates in that behalf specified in the deed, and retained possession thereof for the term of the *Zarbharna*, and at the expiration of such term redelivered the villages to the mortgagor. The mortgagee, however, did not in fact receive by the collection of the rents sufficient to discharge the principal of the loan with interest as mentioned in the deed.

On the 13th January, 1909, within six years from the expiration of the term of the Zarbharna, the respondents, who represent the mortgagee, instituted the present action. By their plaint they asked relief either (1) in accordance with Order XXXIV, Rule 4, of the Civil Procedure Code, on the footing of an existing mortgage of the villages described in the deed; or (2) on the footing of a personal liability on the part of the mortgagor. They claimed to realise what was due to them in the first alternative, out of the mortgaged villages; and, in the second, out of the estate of the mortgagor, who was then dead.

In the course of the action it appeared that the deed of the 14th April, 1896, was unattested, and it was accordingly held by the Subordinate Judge that it could not, having regard to "The Transfer of Property Act, 1882," section 59, be enforced as a mortgage. The respondents did not appeal from and are bound by this decision. The sole question which remained therefore was whether there was any personal liability on the part of the mortgagor for payment of that portion of the loan and interest which remained unsatisfied out of the rents of the villages. In considering this question it must be borne in mind (1) that a loan *primâ facie* involves such a personal liability; (2) that such a liability is not displaced by the mere fact that security is given for the repayment of the loan with interest; but (3) that the nature and terms of such security may negative any

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personal liability on the part of the borrower. It must also be borne in mind that even if the mortgagor be in the first instance under no personal liability, such liability may arise under S. 68 (*b*) or (*c*) of "The Transfer of Property Act." From the argument advanced by the respondents it now appears that paragraphs 6 and 7 of the plaint were intended to show that the object of the allegations made therein was to raise a case under this section. The truth of these allegations was not investigated at the trial, so that the Subordinate Judge could not have relied on them. He held that although the document of the 14th April, 1896, was, according to its true construction, merely a usufructuary mortgage non-enforceable for want of attestation, the mortgagor came under personal liability for payment and that this liability was not statute barred, and by preliminary decree he referred it to a Commissioner to take an account of what had been received by the mortgagee under such mortgage. His reasons for holding that there was such personal liability are somewhat obscure.

Against this decision the present appellant appealed to the High Court, and on the hearing of the appeal the High Court upheld the decision of the Subordinate Judge so far as it determined the existence on the part of the mortgagor of a personal liability not barred by statute, but discharged the reference to a Commissioner on the ground that such a reference would involve the trial of the issues raised in paragraphs 6 and 7 of the plaint, which issues could not be properly referred to a Commissioner, but ought to be determined by the Subordinate Judge himself. The action was, therefore, remitted to the Subordinate Judge to be disposed of in accordance with this decision. The High Court held that the deed of the 14th April, 1896, according to its true construction, imposed on the mortgagor a personal liability, or at any rate did not negative the personal liability incident to a transaction of loan.

The appellant further appealed to His Majesty in Council, and as before mentioned the case came before the Board in the absence of the respondents. The Board were of opinion that having regard to the nature of the deed of the 14th April, 1896, which was a usufructuary mortgage only, and to its terms, any personal liability on the part of the mortgagor was excluded; and that though the allegations of paragraphs 6 and 7 of the plaint might, if established, give rise to other rights of action, such rights

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could not be enforced in an action based substantially on a personal liability arising by implication from the terms of the deed itself. In the absence of the respondents the attention of the Board does not seem to have been directed to S. 68 of "The Transfer of Property Act, 1882," or to the effect of that section if the allegations of paragraphs 6 and 7 of the plaint were established.

Their Lordships, after hearing the respondents, see no reason to differ from the conclusion arrived at upon the first hearing of this appeal, to the effect that the nature and terms of the deed of the 14th April, 1896, are such as to show that it was not originally intended that the mortgagor should be personally liable. They think, however, that the respondents ought to be given an opportunity of proving the allegations of paragraphs 6 and 7 of their plaint, and of establishing that those facts are sufficient to bring the 68th section of "The Transfer of Property Act" into operation. It is to be observed that the position of the mortgagor under this section cannot, by reason of the non-attestation of the deed, be better than it would have been if the mortgage had been duly attested. Their Lordships express no opinion with regard to the question of limitation. This must largely depend upon facts, which have not as yet been investigated. For example, the plaint contains a statement of account which contains items of rents collected up to 1908, and the circumstances under which these rents were received may be material in considering whether the mortgagee's right, if any, is statute-barred. In their Lordships' opinion, the proper course is to discharge the orders made by the Subordinate Judge and the High Court respectively, and to remit the action to the Subordinate Judge for further trial. The appeal having succeeded in part only there will be no costs of this hearing but the respondents ought to pay the costs of the previous hearing which have been thrown away. Their Lordships think the costs incurred before the High Court and the Subordinate Judge should abide the result of the further hearing. Their Lordships will humbly advice His Majesty accordingly.

A. P. P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir John Wallis, Chief Justice and Mr. Justice Burn.

Sindigi Lingappa *alias* Sidda Lingappa, minor by guardian and brother Siddappa and another ... *Appellants (Defts. 2 & 3).*

v.

Sindigi Sidda Basappa and others ... *Respondents (Plffs. Defts. Nos. 1, 4, 5, 6 and 7).*

Sindigi Lingappa *alias* Sidda Lingappa *v.* Sindigi Sidda Basappa.

Hindu Law — Widow — Authority to adopt — Construction—Principles—Authority to adopt boys named—Adoption of another without attempting to follow instructions of deceased—Husband's natural younger brother—Adoption of—Validity—Hindu Law—Custom—Question as to invalidity of adoption under Hindu Law not to be allowed to be raised at late stage—Instructions of the husband to be strictly followed.

Where a Hindu executed a will giving permission to his widow to receive in adoption for him either G or L minor sons of his junior paternal uncle S, and the widow adopted another boy altogether not only without making any attempt to follow the instructions of the husband but after making every effort to avoid conforming to those instructions, *held* that the adoption was on that ground bad.

Quære.—Whether assuming that the widow was unable to adopt the boys mentioned in the will because their father would not give them in adoption, it was open to her to adopt another son in pursuance of the alleged presumed intention to be deduced from the will.

Quære.—Whether the adoption by a widow of a natural younger brother of her husband is invalid under the Hindu Law and whether it might not be permissible according to the custom of the community to which the parties belong.

A question as to the invalidity of an adoption under the Hindu Law ought not to be allowed to be raised at a stage when the party relying on the adoption can no longer adduce evidence to show that it is valid according to custom.

Lal Rup Narain v. *Gopal Devi* 36 C. 780 (P.C.) referred to.

Appeal against the decree of the District Court of Bellary in O. S. No. 4 of 1912.

The facts are stated in the judgment.

The Hon. The Advocate-General (with him *K. S. Ganesa Iyer*) for appellants :—The case really in point is *Suryanarayana* v. *Venkataramana* 1.

[*Chief Justice*: Unless there is some sort of general authority to adopt, you are out of court. Is that not so?]

No. Unless it is clearly shown that the testator did not want anybody except the boys named to be adopted, the adoption of a

* A. S. No. 290 of 1913. 8th November 1916.

1. (1906) I. L. R. 29 M. 382 (P. C.) s. c. 16 M L. J. 276.

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stranger should be held valid. The authority in this case reasonably implies a general intention to be represented by an adopted son. The question in each case is what is the reasonable construction of the authority—whether the testator merely indicates a preference in the case of the boy named or prohibits the adoption of any other than the boy named. *Suryanarayana* v. *Venkataramana* [1] affirmed on appeal in *Suryanarayana* v. *Venkataramana* [2]; *Lakshmi Bai* v. *Rajaji* [3] (where the authority was to adopt the boy named *and no other*); Sir T. Stranges' Notes of cases, Vol. I, p. 78 at 86 (Iyah Pillai's case). Any ambiguity in the authority must be resolved in favour of the validity of the adoption made. See also *Changa Reddi* v. *Vasudeva Reddi* [4] *Saradaprasad* v. *Ramapati* [5] *Mutsaddi Lal* v. *Kundan Lal*, [6] *Narasimha Appa Rao* v. *Parthasarathi* [7].

[*Chief Justice*:—Why was not the generous construction of the authority to adopt given effect to in *Narasimha Appa Rao* v. *Parthasarathi* [7].]

Because, as Sankaran Nair, J. points out in *Chenga Reddi* v. *Vasudeva Reddi* [5], the testator did not indicate a desire to be represented by an adopted son. The testator in that case only said the widows might adopt if they chose, *i. e.*, he made adoption depend upon the will of the widows.

[*Chief Justice*:—In the present case the authority leaves to the widow the discretion to adopt.]

The testator indicates clearly that there should be an adoption to him. He does not leave it to the widow to adopt or not as she chooses.

[*Chief Justice*:—There is no trace of the artificial rule of construction adopted by Farran, C.J. in *Lakshmi Bai* v. *Rajaji* [3]. The decision merely proceeded upon the oral evidence in the case as to the authority.]

The case in *Suryanarayana* v. *Venkataramana* [2] approves of the rule and there is no other Privy Council case directly in point laying down an opposite rule of construction.

1. (1903) I. L. R. 26 M. 681. s. c. 18 M. L. J. 318.
2. (1906) I. L. R. 29 M. 382 at 387.
3. (1898) I. L. R. 22 B. 996.
4. (1915) 29 M. L. J. 144.
5. (1912) 16 C. L. J. 304.
6. (1906) I. L. R. 28 A. 377 (382) P. C.
7. (1913) I. L. R. 37 M. 199 (224) (P. C.) s. c. 26 M. L. J. 411.

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Again under the Hindu Law the adoption of a natural brother of the deceased is invalid and the boys named could not be adopted because they were related to the deceased as natural brothers. Hence the adoption of a stranger is not invalid.

V. Ramesam (Ag. Government Pleader), S. Ranganathier, A. Krishnaswami Aiyar and *S. Aravamudu Aiyangar* for Respondents:—The widow must have followed the directions of the husband in the matter of the boys to be adopted. Even if the authority is a general one, the widow cannot adopt a stranger without making any attempt to secure the boys specified. The finding in this case is that the widow not only made no attempt to secure the boys named but also made every attempt to avoid adopting them. The adoption in question is therefore bad even in the view that the authority is a general one.

The authority is a restricted one. The widow could not adopt a stranger in any contingency. There is no permission given to the widow apart from that which requires specified boys alone to be adopted, *i.e.*, there is no general authority coupled with a recommendation, *Amuto Lall Dutt* v. *Surnomoji Dasi* [1].

The case in *Narasimha Appa Rao* v. *Parthasaradhi* [2] lays down the rule to be adopted in the construction of all authorities to adopt. In that case there was no discretion vested in the widows whether to adopt or not. In *Suryanarayana* v. *Venkataramana* [3] there was no written authority. On the oral evidence, this case was one of a general authority. Further the authority was in the first instance complied with by the widow.

[*Chief Justice.* What do you say to *Lakshmi Bai* v. *Rajaji* [4], and to its being referred to without disapproval in *Suryanarayana* v. *Venkataramana* [5].]

There was no written authority and the case fell to be decided on oral evidence. Further in Bombay a widow can adopt even in the absence of permission, though she cannot if her husband has expressly forbidden. *Amrithayyan* v. *Ketharamayyan* [6] is a case directly in point and is in my favour. The argument that in every case of an authority to adopt the rule of construction should be that there is a primary desire to adopt and a secondary desire to adopt the boy named is irreconcilable with the cases

1 (1900) I.L.R. 27 C. 996. (1002) P. C. 2. (1913) I.L.R. 37 M. 199 P.C.
3. (1906) I. L. R. 29 M. 382 P. C. 4. (1898) I.L.R. 22 B. 996.
5. (1906) I. L. R. 29 M. 382. 6. (1890) I.L.R. 14 M. 65, (69).

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in *Narasimha Appa Rao* v. *Parthasaradhi*[1] and *Amrito Lall Dutt* v. *Surnomoyi Dasi* [2] ; see also *Mutasaddi Lal* v. *Kundan Lal* [3].

[The *Chief Justice* referred to *Chenga Reddi* v. *Vasudeva Reddi* [4].]

The view of Oldfield, J. is correct. There was in that case indication of a general desire to be represented by an adopted son. Further, the widow did not disobey the husband's directions because she did adopt the boy named and adopted another only on the death of the boy originally adopted.

The question as to whether the adoption of either of the boys named would have been invalid ought not to be allowed to be raised because we had no opportunity to let in evidence of custom sanctioning the adoption in the community to which the parties belong. See *Lala Rup Narain* v. *Gopal Devi* [5]. The adoption by a widow of a natural younger brother of her husband is not invalid under the Hindu Law. See Mayne, p. 173; Reprint of Indian Decisions, Vol. 6, p. 557; Mad. Decisions (1852) p. 86 (91) (Sudder Court). 2 Sel. Decisions (Bengal) 245 only lays down that an elder brother cannot be adopted by his younger brother because in Dattaka Mimamsa it is so specifically laid down. *Iyah Pillai's* case was a case of the adoption of a brother and that is distinguished only on the ground that the mother was alive and did not consent. 3 M. 15 does not refer to this question. 11 M. 49 (55) F. B.; Steel's Laws and Customs of Hindus, p. 44 are in favour of such adoption. Further there is a difference between the case of the adoption of a full brother and that of a half-brother.

The Hon. The Adv. General in reply.

In *Narasimha Appa Rao* v. *Parthasaradhi*[1] the Privy Council came to the particular conclusion because they thought the testator was influenced by secular considerations. The adoption of a natural brother is at least very risky. Therefore the widow was not bound to adopt the boys named. If the natural father of the boys named refused to give them, and there is evidence of his refusal, and the widow adopted a stranger, acting *bona fide* in the matter, the adoption is valid. If both the widow and the parents of the boy adopted acted *bona fide*, the adoption is valid, though the widow did not act according to her husband's directions.

1. (1913) I.L.R. 37 M. 199. P. C. 2. (1900) I.L.R. 27 C. 996. P.C.
3. (1906) I.L.R. 28 A. 377, (380) P.C. 4. (1915) 29 M.L.J. 144.
5. (1909) I. L.R. 36 C. 780, (795) (P. C.)

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The Court delivered the following

Judgment:—This is an appeal from the judgment of the District Judge of Bellary declaring the alleged adoption of the second defendant by the 1st defendant invalid. The husband of the 1st defendant who died on the 15th September 1910 executed a will Ex. A in which he said " I have kept my moveable and immoveable properties under her (meaning his mother's) control. In future also they should be only under her control. My wife Basamma is now a young girl of 15 years of age. She should be under the control and guardianship of my mother Rudramma. I have given permission to the said Basamma to receive in adoption for me either Gavappa or Lingappa, minor sons of my junior paternal uncle Sindigi Rudrappa, whomsoever (of them) may be chosen by mother". He died afterwards and there were disputes between the minor widow and her mother-in-law Rudramma and a petition was put in the District Court to remove Rudramma from the guardianship and appoint someone else. An order to that effect was made on the 4th February 1911. Up to that time Rudramma and Basamma had been at enmity. What we find is then that, within two days of this order, an adoption not of one of the boys mentioned in the will but of another boy altogether was arranged and carried out by Rudramma, and Basamma in conjunction with Basamma's father and the 3rd defendant. The evidence is that the 3rd defendant paid to the widow's father Marreppa Rs. 22,000 on account of the widow to induce her to take his brother, the 2nd defendant in adoption. There is also evidence that a sum of Rs. 6,000 was paid to Rudrappa, the father of the boys mentioned in the will for executing a document Ex. II in which he expressed his refusal to give his sons in adoption. According to the evidence for the plaintiffs this sum was paid by the father Marreppa out of the Rs. 22,000 which had been paid him by the 3rd defendant on account of the widow. There is also evidence for the plaintiffs that when Rs. 6,000 was taken for that purpose jewels worth Rs. 6,000 belonging to Rudramma were pledged with Marreppa on behalf of the widow. There is some discrepancy in the evidence as to the exact time at which the sum of Rs. 6000 was paid, but Rudrappa has not been called to contradict the evidence that he was paid a certain sum and the evidence in the case points to his consent having been obtained in that way. Ex. II purports

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to have been executed on the 4th of February 1911. Exhibit I which is the deed of adoption refers to it as having been executed on the 4th and the oral evidence is that it was executed on the 6th after the adoption. There is no evidence in the case that any attempt really was made to get the consent of Rudrappa to the adoption. The evidence so far as it goes is that every endeavour was made to induce him not to give his sons. The 1st defendant, the widow says that she never asked him for his consent to the adoption and there is no evidence that anybody else ever asked him and hence the recital in Exhibit II is not proved. In this state of things we are clearly of opinion that the alleged adoption cannot stand.

An argument was addressed to us on the somewhat difficult question whether assuming that the widow was unable to adopt the boys mentioned in the will because their father would not give them in adoption, it was open to her to adopt another son in pursuance of the alleged presumed intention to be deduced from the will. It had been held in this Court and by the Privy Council in *Suryanarayana* v. *Venkataramana* [1] that where there is a general authority to adopt and the adopted boy dies, the widow is authorised under the general power to adopt another son in his place. Where the will gave power to adopt a particular boy, and that boy died and the widow adopted another boy in his place there was a difference of opinion in this Court in *Chenga Reddy* v. *Vasudeva Reddy* [2] as to whether the authority to make the second adoption could be implied in the circumstances. In that case Sankaran Nair, J. relied in a passage in West and Buhler which had been cited with approval by Farran, C. J. in *Lakshmi Bai* v. *Rajaji* [3] and was of opinion that such authority might be implied. Oldfield, J. was of the contrary opinion. We do not think it necessary to decide the point in this case. What is laid down by their Lordships in *Suryanarayana* v. *Venkataramana* [1] is that any instruction the husband might have given to his widow must be strictly followed. In the present case there was really no attempt to follow the instructions of the husband but every effort was made to avoid conforming to those instructions and we are clearly of opinion that on this ground the adoption is bad.

1. (1906) I. L. R. 29 M. 382. 2. (1915) 29 M. L. J. 144.
3. (1898) I. L. R. 22 B. 996.

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Then another point was taken. It was said that the widow was really prevented from adopting one of the boys mentioned in the will because they were the younger brothers of the deceased who had himself been adopted. No such point was taken in the written statement. All that it said was that Rudrappa feared that the adoption might be against Hindu Law and there is no evidence to support that allegation. Mr. Ramesam for the respondent has contended that even in cases of Brahmins there is no prohibition against the adoption of a younger brother into another family. Whether that be so or not, we must decline to go into this question.

It appears from the passage in *Minakshi* v. *Ramanadha* [1] that adoptions of this sort are not unusual among Brahmins and in a case in which we are about to give judgment we find amongst Sudras also an adoption of this sort, which was questioned and disallowed not on this ground but on the ground that at the time the boy was given in adoption he was an orphan. In these circumstances, we think that if it were intended to raise the question, it should have been specifically raised in the pleadings so that an issue might have been taken upon it and the plaintiffs might have had an opportunity of showing that such adoptions are permissible according to the custom of the community to which they belonged, a thing which it is quite possible that they would have been able to prove having regard to the fact that the will was prepared by a well-known vakil and was attested by members of their community who must be presumed to have known if there was anything in it which was opposed to the usages which govern the community. The case which has been cited to us *Lala Rup Narain* v. *Gopal Devi* [2] shows that in these circumstances, we should be wrong in allowing questions of this sort to be raised at this stage. It was also attempted to be argued that these persons were inhabitants of Bombay where no authority to adopt is required but no such point was raised here or in the Court below and we decline to go into it in this appeal.

In the result the appeal fails and is dismissed with costs payable by the 2nd appellant.

A. S. V.

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1. (1888) I. L. R. 11 M. 55. 2. (1909) I. L. R. 36 C. 780.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Seshagiri Aiyar.

K. M. P. R. Palaniappa Chettiar ... *Appellant* * (*Respondent in C. M. P. No. 3230 of 1915 on the file of the High Court*).

v.

V. R. M. M. Ramaswami Chettiar ... and others. *Respondents* (*Petitioner in do.) and Crown Prosecutor of Madras.*

Palaniappa Chettiar v. Ramaswami Chettiar.

Cr. P. Code, S. 195—Sanction to prosecute—Grant of—Principles—Duty of court to which application is made—Object of section—Observations on—Appellate Court setting aside order of court below granting sanction.

As a rule, if the court whose sanction is applied for is of opinion that a man has committed the offence in respect of which sanction is applied for and can be prosecuted with a fair chance of success, it will be desirable that justice should be vindicated. But exceptional cases will occur in which a prosecution may possess every chance of success and yet be undesirable, *e.g.*, where the moral turpitude is very slight, the offender may have already suffered sufficiently or other considerations may intervene. In such cases, a court might prudently and properly refuse sanction. A court may properly refuse sanction where it considers that a prosecution is not desirable in the public interest.

The court whose sanction is applied for need not confine its attention to evidence already legally on record. It may fairly and reasonably take other circumstances into consideration, and in particular the probability of other evidence being adduced at the trial.

Per *Seshagiri Aiyar, J*: Care should be taken to see that in the order granting sanction conclusions are not stated which may prejudice the accused.

Appeal under Cl. 15 of the Letters Patent against the judgment of Mr. Justice Napier in C. M. P. No. 3230 of 1915 granting sanction to prosecute the appellant for an offence under S. 193, I. P. C. in respect of certain statements in his counter affidavit dated the 21st July 1915 filed in C. M. P. No. 1403 of 1915 in A. S. No. 163 of 1915, preferred to the High Court against the decree of the Court of the Subordinate Judge of Ramnad in O. S. No. 353 of 1910.

T. Rangachariar for Appellant.

The Crown Prosecutor and R. Sadagopachariar for Respondents.

The Court delivered the following

Ayling, J.

Judgments;—*Ayling, J*.:—This is a Letters Patent Appeal against an order of Napier, J. passed under S. 195 of the Code of

* L. P. A. No. 168 of 1916. 14th November 1916.

Palaniappa Chettiar v. Ramaswami Chettiar.

Ayling, J.

Criminal Procedure, sanctioning the prosecution of the appellant for making false statements in an affidavit filed by him in connection with C. M. P. No. 1403 of 1915 on this Court's file.

Such difficulty as its disposal presents is owing mainly to the divergent views which have been held regarding the *principles* which should be observed by a court in granting or refusing sanction under this section.

The section itself undoubtedly neither lays down nor even suggests any principles for the court's guidance. As Jenkins, C. J., put it in *In re An Attorney* [1]: "The section is expressed in the widest terms, and vests in the court an absolute and unfettered discretion." On the other hand, as the learned Judge proceeds to say at page 458, "There are, however, certain rules of prudence to which any court exercising its discretion would have regard, and pre-eminent among them, possibly a compendious statement of all, would be the rule that the court will be astute to see that there shall be no abuse of the administration of Criminal Justice. No one, therefore, would be permitted to use the general law merely to satisfy his own private ends or personal spite; that would be to misuse it." With all this I entirely and respectfully agree.

In the present case, we must be loth to interfere with an order of a learned Judge of this Court which is primarily of a discretionary nature. On the other hand the law casts on us the duty of deciding in appeal whether the order is correct and as the learned judge has, I think, purposely refrained from discussing the merits of the case or recording any reasons, we are necessarily forced to consider whether the order is one which we should ourselves have passed in the circumstances. Our peculiar difficulty is that we are not even in a position to say that the learned Judge has himself considered points which may appear to us essential to a determination of the case. We must therefore apply for ourselves the rules of prudence referred to by Jenkins, C.J., quoted above.

They have been variously stated at great length by different judges with the facts of different cases in their minds. But speaking for myself and with all deference I would put it thus:—To ensure that there shall be no abuse of Criminal Justice, a court before granting sanction should consider whether the case

1. (1913) I. L. R. 41 C. 446 at 457.

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is one in which a prosecution could be instituted with a fair chance of success. See *Pampapathi Sastri* v. *Subba Sastri* [1]. This is necessary to avoid the risk of frivolous or vexatious prosecutions designed not to vindicate justice, but to harass and annoy the person against whom they are directed. Without some such safeguard, the Criminal Courts in this country would be flooded with useless prosecutions. I take it that S. 195 of the Code of Criminal Procedure was enacted not because a perjurer, for example, was entitled to more protection or consideration than any other offender; but because in the case of offences of the class specified there exists a responsible officer who is in a position to form an opinion before the prosecution is instituted whether it is one, into which, from the public point of view, a Criminal Court may profitably enquire. The consideration of this question need not involve (to quote Stephen, J. in the above mentioned case *In re An Attorney*[2] that " the court to whom the application for sanction is made should perform any of the acts that will fall within the scope of the Magistrate's duty, if sanction is granted." The court whose sanction is applied for need not confine its attention to evidence already legally on record. It may fairly and reasonably take other circumstances into consideration, and in particular the probability of other evidence being adduced at the trial. In effect by awarding sanction, it does not say to the Court which tries the case "This is a case in which I think you will have to convict," but " This is a case which I think it is worth your while to enquire into."

Apart from the prospects of success, I think a Court may properly refuse sanction where it considers that a prosecution is not desirable in the public interests. This is a question which will only present difficulty in infrequent cases. As a rule, if the Court is of opinion that a man has committed the offence in respect of which sanction is applied for and can be prosecuted with a fair chance of success, it will be desirable that justice should be vindicated. But exceptional cases will occur, in which a prosecution may possess every chance of success and yet be undesirable, *e.g.*, where the moral turpitude is very slight, the offender may have already suffered sufficiently or other considerations may intervene. In such cases, a court might prudently and properly refuse sanction.

1. (1899) I. L. R 23 M. 210. 2. (1918) I. L. R. 41 C. 446, at p. 460.

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Ayling, J.

I am far from putting the above remarks forward as exhaustive but they represent principles which have been generally followed by the Courts of this Presidency and from which I do not think we ought to depart and from which we cannot depart, if we are to be "astute to see that there is no abuse of the administration of Criminal Justice." I do not think the judgment of the Calcutta case enunciates anything really contrary to them, though the learned judges have felt it necessary to protest against the tendency to unduly fetter the discretion of the sanctioning court by quoting judicial pronouncements. It may be that in the case before them they accepted the fact that the application was made by the Public Prosecutor after due deliberation and scrutiny of the papers placed in his hands by a Bench of the Court, as sufficient guarantee that it was a fit and proper case for sanction. I am far from saying that they would not have been justified in doing so. But similar cases are rare and where as in the case before us, sanction is applied for by a private party it will be for the court to test its desirability by the rules of prudence referred to by the Chief Justice.

Viewed from this standpoint, I do not think the present case is a suitable one for sanctioning prosecution. The circumstances have been placed before us fairly fully and are set forth in the judgment of my learned brother. I agree with him that there is no chance of securing a conviction in the case of either of the specified statements. The sanction is applied for by the appellant's adversary in the Civil Appeal (A. S. No. 163 of 1915) now pending and the latter appears to me to be taking advantage of the existence of certain inconclusive recitals in Ex. E and of Ex. H and H 1 to harass appellant by a vexatious prosecution. No satisfactory grounds have in fact been indicated to us for coming to the conclusion that the statements are false.

I would set aside the sanction.

Seshagiri Aiyar, J.

Seshagiri Aiyar, J. :—I entirely agree. This is an appeal against the order of Mr. Justice Napier, granting sanction to prosecute the appellant for having made false affidavit in the High Court. The appellant Palaniappa Chetty is the respondent in a first appeal pending in this Court. He obtained a decree for Rs. 23,000 and odd in the Court of First Instance. After the first appeal was filed, an application for stay of execution was made. The allegation in the petition asking for stay of execution

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was that Palaniappa Chetty was not a man of means. In answer to this affidavit, Palaniappa Chetty filed a counter affidavit in which he stated that he owned "1000 acres of Nanja and Punja lands in Perumalipatti attached to the village of Kudukkanpatti, Melure Taluq, Madura District, worth more than one lakh of rupees and that he also owned a house in Palani worth about Rs. 6000. Mr. Justice Napier considered these two statements to be false and sanctioned the prosecution.

I am constrained to differ from the learned Judge. It was argued by Mr. Sadagopachariar that on the face of the records filed in this case, there are *prima facie* grounds for enquiry, and that we would not be justified in interfering with the discretion of the learned Judge. Although sitting in appeal, we are bound to be guided very largely in matters of discretion, by what influenced the learned Judge, I cannot accede to the contention that our hands are practically tied in such cases.

I do not think it necessary to examine at any length the authorities regarding the quantum of proof that is necessary before sanction is accorded; but I should like to indicate as briefly as possible my views on the subject. The paramount principle is to see that the person to be charged before a Magistrate is not subjected to unnecessary expense and humiliation. The liberty of a subject should not be subjected to restrictions which are not absolutely called for. The second principle is that it is not what on the face of a document or of a statement appears to be untrue that should guide a court in granting sanction. If further materials are placed before it which would enable it to conclude that the *prima facie* impression is unfounded, it is the duty of the Court to examine the materials fully and to satisfy itself whether, in the interests of justice, the prosecution is desirable. The third principle upon which Mr. Sadagopa Chariar laid some stress and which should undoubtedly guide the courts in such matters is that the order granting sanction should express no definite pronouncements on the matter to be enquired into. I do not understand by this reservation that the Court granting sanction is not to apply its mind fully to the materials placed before it. On the other hand, every circumstance telling in favour of the person against whom sanction is asked for, should be weighed before the court makes up its mind, although in the order granting the sanction, care should be

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taken to see that conclusions are not stated which may prejudice the accused. There have been a series of cases in this Presidency which have enunciated the above principles in some form or other. *Chakrapani Iyengar* v. *King Emperor* [1] a full Bench of this Court said, "There is no probability of securing the appellant's conviction even if sanction is granted, and we, therefore set aside the sanction accorded by the Sessions Judge." In *In re Paree Kunhamed* [2] Mr. Justice Bashyam Aiyangar discussed this question at some length and came to the conclusion that "it is the duty of the authority giving sanction or upholding it to go into the merits of the application for sanction with reference to the evidence before it and that, unless there is sufficient *prima facie* evidence and a reasonable probability of conviction, the Court will not be exercising its discretion properly in granting or upholding the same". I entirely adopt the language of the learned Judge at page 117, where he says "The object of Section 195 is to protect parties resorting to courts and witnesses against vexatious or frivolous prosecutions for their resorting to courts and giving evidence therein and such protection is afforded by prescribing the necessity of a preliminary sanction by the Court before which the offence is alleged to have been committed before a prosecution is launched and by giving a right of appeal to the court to which the Court giving sanction is subordinate." In *Veeraraghavaswami Naidu* v. *Bagavantula Visvanadham*,[3] Ayling and Spencer, JJ. held that it is the duty of the Coutt to see if there are good grounds for thinking that a prosecution is necessary in the interest of justice. On the other hand Mr. Justice Napier in *Krishnama* v. *Chitturi China Perraju* [4], has taken a view which is opposed to the current of authorities in this Presidency. He has dissented from the dictum of Mr. Justice Bashyam Iyengar in *In re Paree Kunhamed*[2] and has preferred to follow the ruling of the learned Judge of the Calcutta High Court in *In re an Attorney* [5]. With all respect, I am unable to agree with the view enunciated by the learned Judge. With some of the observations of the learned Judge I am in entire accord. As the learned Judge points out, the appellate Court should see that by the granting of sanction there has been no abuse of the administration of criminal justice. But when he says that the discretion is absolute and

1. (1902) 12 M. L. J. 408.
2. (1902) I. L. R. 26 M. 116.
3. (1911) 2 M. W. N. 172.
4. (1914) 17 M. L. T. 15.
5. (1913) I. L. R. 41 C. 446.

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unqualified, I beg leave to differ from him. It is a discretion given in the instrests of justice and in the interests of persons to whom protection is intended to be given under S. 195 of the Code of Criminal Procedure; and therefore unless the discretion is exercised to advance justice and to extend the protection, the Court will not be exercising its discretion properly. As regards the decision in *In re an Attorney* [5] I desire to speak with greatest respect. With a great deal of what is said in the case, I agree. In one place the learned Chief Justice says at page 456, "We are not trying the guilt or innocence of his client; we are merely considering whether the statutory bar imposed by S. 195 of the Code of Criminal Procedure should be removed and the law allowed to take its ordinary course." In my opinion, this view of S. 195 requires some modification. The learned Chief Justice seems to be of opinion that S. 195 imposes a bar to an otherwise uncontrolled prosecution. I would substitute the words "protection given" for the words "the statutory bar imposed". S. 195 is intended to safeguard the rights of persons who go to a Court of law, Courts throw their shield of protection over persons who resort to them. That is the reason why, proceedings in a Court of law are regarded as privileged; if that privilege is abused or exceeded, a person may be prosecuted for anything said or done by him. Before withdrawing the protection the presiding officer should be satisfied that the privilege has been forfeited and that the man should be prosecuted to vindicate Justice. If the presiding functionary is satisfied that there has been such a conduct on the part of the person as renders the person liable to conviction and that on the materials a conviction is probable, then he should withdraw the protection and sanction the prosecution. S. 195 should be examined only from this standpoint. In this view unless there is a probability of conviction and unless the interests of justice demanded it, there should be no sanction. I do not propose to go into the case-law any further because the cases are numerous and are not easily reconcileable; but so far as Madras is concerned, except this discordant note sounded by Mr. Justice Napier there has been practical uniformity and consistency in enunciating the principles I have stated. I shall now proceed to examine the facts of the case.

As regards the first of the two statements for which sanction is given to prosecute, the facts are these: The lands claimed by

1. (1918) I.L. R. 41 C. 449.

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Palaniappa Chetty originally belonged to one Sivarama Aiyar. Sivarama Aiyar sold them by Exhibit F and G to the father of Palaniappa Chetty in 1903. Prior to the sale, Sivarama Aiyar had executed a lease to one Venkatakrishna Aiyangar and a Chetti. Venkatakrishna Aiyangar mortgaged his lease right to one Ramaswami Chetti. After this Palaniappa Chetti sold the properties to Nagappa Chetty in the year 1911 by Exhibits H and H 1. In 1904 in O. S. No. 145 of 1914, Ramaswami Chetty, the mortgagee from Venkatakrishna Iyengar, sued to enforce his mortgage on the lease right of Venkatakrishna Aiyangar. To this suit, Palaniappa Chetty was a party, Venkatakrishna Aiyangar, the mortgagor, Nagappa Chetty the purchaser from Palaniappa Chetty were also parties. Palaniappa Chetty filed a written statement in that suit on the 3rd July 1915 in which he stated that although he sold the property to Nagappa in 1911, that was a nominal transaction, and that he was still the real owner. Nagappa did not contest this statement. He remained *ex parte* and it is common ground that the litigation was defended really by Palaniappa Chetty, Venkatakrishna Aiyangar, as I said before was a defendant in the suit and must have been aware of the written statement filed by Palaniappa Chetty on the 3rd July. It was after this written statement in the Court of the Subordinate Judge of Madura that an application was made to this Court for stay of execution in the first appeal referred to by me. The order on the said petition was that the appellant should deposit the money into Court and that Palaniappa Chetty who was the respondent in the appeal should draw it only on giving security therefor. After the order was passed, Venkatakrishna Aiyangar filed an affidavit on the 5th October 1915 before the learned Judge Mr. Justice Napier in which he alleged that the statements of Palaniappa Chetty in his counter affidavit in the execution application that he was entitled to 1000 acres of land and was the owner of a house in Palani was false, and that sanction should be accorded to prosecute him. In answer to that affidavit, Palaniappa Chetty filed an affidavit before the learned Judge in which he drew attention to the fact that he had stated as early in July 1915 that the property belonged to him, and that he had no intention of swearing falsely to its ownership. Now the question is as to whether when a person has been consistently claiming property as his own, notwithstanding the passing of a sale deed in favour of another person, he can be said to

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have made a wilfully false affidavit in that behalf. Nagappa Chetty, the alleged nominal vendee, did not dispute this claim. Venkatakrishna Aiyangar the person the most interested in the litigation with the knowledge that Palaniappa Chetty had asserted his claim to the lands, charged Palaniappa Chetty with having made false statements. This man who apparently wants to invoke the authority of the Court to vindicate justice has not been honest enough to state, that in the litigation in the Madura Sub-Court, Palaniappa Chetty had made the same statements which he had subsequently reiterated in the affidavit, filed in this Court. It is impossible under these circumstances to have taken Venkatakrishna Aiyangar seriously and to have acted upon his affidavit as against a consistent assertion of right made by Palaniappa Chetty first in the Madura Sub-Court and subsequently in this Court. Is it possible under these circumstances that the prosecution of Palaniappa Chetty on such a statement can be successfully maintained in the Criminal Court, and is it right with these facts staring us in the face, to compel this man to submit himself to all the indignities of a criminal prosecution? In my opinion on the materials placed before us there are no sufficient grounds for holding that Palaniappa Chetty made a wilfully false statement in respect of the ownership of the 1000 acres. Mr. Sadagopachariar referred to the extent and value having been exaggerated. These are not matters which appealed to the learned judge in granting the sanction.

The second item of charge is even less substantial than the first one. Ex. E is the sale deed in respect of the Palani house. The consequence is absolutely to Palaniappa Chetty. The document states that he is to enjoy the house from generation to generation with the power of alienation by way of sale, gift &c. It was said that certain recitals in the deed point to the property being held in trust and not absolutely by Palaniappa Chetty. There is no justification for such an inference on the materials available to us. I am satisfied from the statements made that the property was absolutely at his disposal although he intended to dedicate that property for a charity at some time or other. I am therefore of opinion that as there is no chance of a conviction being had in respect of these two statements made by Palaniappa Chetty in the affidavit filed in this Court, the sanction granted by the learned Judge should be revoked.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

Sree Rajah Bommadevara Venkata Narasimha Naidu Bahadur Zemindar Garu ... *Appellants * in all cases* (*Plaintiff.*)

v.

Andavolu Venkataratnam (died) and others. *Respondents* (*Defendants.*)

Sree Rajah Bommadevara Venkata Narasimha Naidu v. Andavolu Venkataratnam.

Civil Procedure Code of 1908, *S.* 11, Res judicata—*Decision on question of law —What is—Issue of mixed fact and law—Test "Matter" in S.* 11—*Meaning.*

Per Sadasivaiyar, J:—A decision on an abstract question of law in one suit is not *res judicata* so that the law of the land should itself be deemed to have been altered when that question arises in subsequent suits between the same parties; but a legal right found, declared or awarded in favour of one of the parties in one suit though based on an erroneous view of the law or an erroneous construction of a document is *res judicata* when the same legal right is controverted in subsequent suits between the same parties.

Per Napier, J:—Where a decision on a point of law, whether it be on the construction of a document or of a statute or on common law or on customary law settles a question that arises directly out of conflicting views as to the rights of the parties, it is *res judicata.*

The question whether an issue arising in a case is of law or is of mixed fact and law must depend on the way in which the issues are framed quite apart from the question which is really decided in the case.

Meaning of the word "matter" in S. 11, Civil Procedure Code.

The cases in *Parthasaradhi Ayyangar* v. *Chinnakrishna Ayyangar* [1], *Mangalathammal* v. *Narayanaswami Ayar* [2], *Natesa Chetti* v. *Vengu Nachiar* [3], do not accurately express the law.

Badar Bee v. *Habib Merican Noordin* [4], and *The Secretary of State for India* v. *Maharaja of Venkatagiri* [5], followed.

Second appeal against the decrees of the District Court of Kistna at Masulipatam in A. S. Nos. 133, 134, 135, 136, 138, 139, 140, 141, 142, 143, 145, 148, 148 and 150 of 1913 preferred against the decree of the Court of the District Munsif of Ellore in O. S. Nos. 899, 891, 896 of 1911, 894, 294 of 1908, 962, 897 of 1911, 295 and 301 of 1908, 894, 890, 895, 900 of 1911 and 932 of 1908 respectively.

B. Narasimha Rao for *V. Ramadoss* for Appellants.

V. Ramesam for Respondents.

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* S. A. Nos. 1108 to 1111, 1113 to 1118, 1120, 1123 to 1125 of 1914.

10th October 1916.

1. (1882) I. L. R. 5 M. 304.
2. (1907) I.L. R. 30 M. 463.
3. (1909) I. L. R. 33 M. 102.
4. (1909) A. C. 615.
5. (1916) 31 M. L. J. 97 (117).

Sree Rajah Bommadevara Venkata Narasimha Naidu v. Andavolu Venkataratnam.

Napier, J.

The Court delivered the following

Judgments :—*Napier, J.*—These are series of appeals by the Plaintiff zamindar in suits brought by him against tenants to recover a cess known as Ghattuthumulu. It is not properly a cess at all as only Government and Statutory bodies can levy cesses, but is a charge claimed by him in respect of pre-anicut irrigation facilities which are no longer in existence. As pointed out by the District Judge, the High Court held that this charge is recoverable, but he has dismissed the suits on the ground that the principle of *res judicata* prevents the recovery. He has divided the appeals before him into five batches, the 1st four being those in which notice had gone to the respondent and the 5th. batch containing appeals in which no notice had gone but were dealt with by him under O. XLI, rule 11. It will be convenient to treat these latter with the 1st four as the appeals are before us. Out of the whole number, however, some are not yet before us and they will be indicated in the classification. Following his classification as far as possible, we devide the appeals as under ; The 1st batch corresponds to his first batch and contains S. A. Nos. 1110, 1115 and 1124 together with S. A. Nos. 1119 and 1121 which are not before us. The 2nd batch contains his 2nd and 3rd batches and covers S. A. Nos. 1109 1114, 1120, 1123, 1111, 1113, 1116, 1117, and 1125. The third batch contains S. A. Nos. 1118 and 1108.

Mr. Ramesam for the respondent admits that the appellant is entitled to succeed in the 1st batch as they undoubtedly must be decided against him if his contention on the 2nd batch is sustained. He also admits that the 3rd batch must also succeed on the same principle—with the result that Second Appeals Nos. 1110, 1115, 1124, 1108 and 1118 must be allowed if we uphold his argument.

There remains then to consider the 2nd batch. It is urged that these are *res judicata* in that the High Court in 1912 in S. A. Nos. 616 to 629 of 1908 held, on second appeal from the decision of the District Munsif in suits of 1905, that the matter was *res judicata* by reason of the decision of the District Munsif between the same parties in 1902. It is not denied that the decision of the High Court in 1912 does cover these cases. It is urged, first that that judgment although correct on the materials then before the High Court does not bind us in these second appeals because another judgment of the High Court in 1892 was not before it; secondly, that that judgment of the High

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Court in 1912 is not binding on us because it is merely on a point of law. With regard to the 1st argument it is sufficient to say that this contention was never put before the District Munsif who decided the cases now under appeal and we cannot allow it to be raised now. We must therefore confine ourselves to the 2nd question.

The broad proposition contended for is that a decision on a pure question of law is not *res judicata.* The decision of the High Court is Exhibit K and it simply says "we accept the findings and set aside the decrees". The issue sent down for finding was whether the parties to those second appeals and the lands, the subject of them, were the same as those dealt with by the District Munsif in 1902, and the finding was that the parties and the lands were the same. It is then argued on this that the question decided by the Munsif in the suits of 1902 was a pure question of law and accordingly the decision of the High Court in 1912 must have been a pure question of law too. The decision of the Munsif is Exhibit F, and the issue is as follows :—"Is the plaintiff entitled to levy on the plaint land the cess called Ghattuthumulu. (This issue includes consideration of the question whether, granting that the cess is payable by custom the plaintiff is not entitled, in the present circumstances of the parties to enforce the same). It is dealt with by the Munsif in page 53 of the printed papers and his decision is as follows :—" I hold that the plaintiff's contention, that he is entitled by the sheer force of custom to a perpetual payment of the plaint cess by the inamdars without any objection on his part to maintain any of the old irrigation works in the villages concerned is not sustainable." Now there is no doubt that if the question of *res judicata* was out of the way this would be the very issue to be decided by the High Court now and we have therefore to decide whether that finding does operate as *res judicata.*

Mr. Ramesam urges that it is a mixed question of fact and law and, as such, is *res judicata.* Mr. Narasimha Row relies on certain decisions. In *Mangalathammal* v. *Narayanaswami Aiyar*[1] it was decided that an erroneous decision on a question of law in a previous suit is no bar to a subsequent suit between the same parties to the court deciding the same question provided the decision in the latter case does not in any way question the correct-

1. (1907) I. L. R. 30 M. 461=17 M. L. J. 260.

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ness of the former decree. In *Natesa Chetti* v. *Vengu Nachiar*[1] it was decided that an order or decree passed on a mistake of law does not operate as *res judicata*, with the same reservation. Now it could at once be conceded that a decision on an abstract question of law is not *res judicata*. But the difficulty arises in applying that proposition to cases that come before the court. It is a very convenient treatment to say that a particular case is a mixed question of fact and law and to hold that the doctrine, therefore, does not apply. But speaking for myself, I find it difficult to appreciate exactly what is meant by the term" mixed question of fact and law". It seems to me that the question, whether an issue arising in a case is of law or is of mixed fact and law, must depend on the way in which the issues are framed, quite apart from the question which is really decided in the case.

It must be possible to split up any issue which, as framed, contains questions of fact and law in such a manner that a pure issue of law can be framed on the hypothesis of the finding of fact one way or the other, and I cannot conceive that the whole question should be decided by the frame of the issue. It is a matter of daily experience that some Judges frame issues in a concentrated form, while others analyse the questions at issue between the parties and frame an issue of fact. I must not be understood to mean that the phrase " mixed question of fact and law " is not one that should be used. I only mean that to me it does not contain a principle which I can apprehend.

Before proceeding to examine the cases any further, I think it advisable to examine the section, which is S. 11 of the present Code of Civil Procedure, "No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties." O. XIV, rule 1 states that "Issues arise when a material proposition of fact or law is affirmed by one party and denied by the other "; and " Issues are of two kinds; Issues of fact and issues of law." Applying the language of O. XIV to S. 11 we get the language "No court shall try any suit or issue of fact or of law in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit." Mr. Narasimha Row contends that the word 'matter' there does not include a point of law and this may be

1. (1909) I. L. R. 33 M. 102=20 M. L. J. 20.

See Rajah Bomma-devara Venkata Narasimha Naidu v. Andavolu Venkata-ratnam.

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so with regard to some propositions of law decided in a case, but the word 'matter' is used in two of the explanations to the section; the second of which certainly throws light on its meaning; "Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been directly and substantially in issue in such suit." It can hardly be contended that a defence or claim based on a question of law is not 'matter' within the meaning of this explanation. If his contention were correct the decision on a point of law in any suit, (entirely apart from the question of a decision on an issue) would not be final between the parties and a fresh suit could be brought on the same cause of action, provided that a new point of law was raised. So 'matter' must include an issue of law sometimes, and it seems to me that where the point of law directly affects the rights in litigation between the parties to the suit it must be matter within the meaning of the section. The doctrine of *res judicata* is stated in Halsbury's Laws of England, Vol. 13, p. 331 as follows: "Where *res judicata* is pleaded by way of estoppel to an entire cause of action, it amounts to an allegation that the whole legal rights and obligations of the parties are concluded by the earlier Judgment which may involve the determination of questions of Law as well as findings of fact." In my opinion the phrase "legal rights and obligations" of the parties and the words "which may involve the determination of questions of law" cover the same ground as the language "any suit or issue of law in which the matter directly and substantially in issue &c., &c." in the section. Mr. Ramesam relies on a decision of the Privy Council in *Badar Bee* v. *Habib Merican Noordin* [1] and a careful examination of this case certainly does shew the principle which the Board applies, quite apart from the particular language of the section. The appellant petitioned to have it declared that the devise and gifts contained in the 6th clause of the testator's will were void, and that the lands comprised therein and the income thereof being undisposed of belonged to the testator's next of kin. By that 6th clause he gave certain lands in Penang which he directed to be called "the *wakkoff* of Mahomed Noordin," to trustees for certain purposes. By a decree of the Supreme Court of the Straits Settlements in 1872, it was held that one of the purposes for which the

1. (1909) A. C. 615.

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income of the *wakkoff* was to be applied was void as not being lawful charitable gifts and that the gifts fell into the undevised residue of the testator's estate. In consequence of this decree a sum of $ 700 out of the rents and profits of the *Wakkoff* were for several years paid to the next of kin. But the trustees, after that, seem to have declined to pay this amount either to the next of kin or to the residuary legatees, doubtless owing to the residuary legatees having protested against payment to the next of kin. In 1889 one of the next of kin brought a suit in respect of that annual sum of $ 700 against the trustees. The trustees pleaded that they were advised that the amount ought to be paid to the residuary legatees. It was decided by the court that the defendants were estopped from raising that defence. Several years afterwards, the only daughter of the eldest son of the testator filed a petition for declaration that the property comprised in the *wakkoff* was at the death of the testator vested in his trustees and executors in trust for the next of kin of the testator living at the time of his death. It was decided by the Court of Appeal that the said lands were vested in the said trustees in trust for the residuary legatees, save and except the two yearly sums amounting to $ 700, which yearly sums were payable to the testator's next of kin—the ground of decision being that, so far as the yearly sum of $ 700 was concerned, the matter was *res judicata* by the first decree. But they held that that amount of $ 700 formed only a small portion of the total income yielded by the properties mentioned in clause 6 and that there was nothing in the case from which it could be inferred that the next of kin had been recognised as entitled to anything beyond $ 700. The next of kin appealed to the Privy Council and it was in that appeal that the present judgment was given. Their Lordships say:—"The decree of 1872 was a decision on the construction of the testator's will as to the destination of funds released from the operation of the trust declared by the 6th clause of the will..................... The result is that it appears that the point raised by this appeal has already been adjudicated on and it is not open to the court, in the case of the same question arising between the same parties, to review a previous decision not open to appeal." Now here clearly the decision of the first court was a pure question of law, namely, the construction of the testator's will, the question being to whom any moneys released from the trust by reason of the trust being

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found not to be good at law should go. The amount affected by the judgment was only a sum of $ 700, but their Lordships have held that the first case decided the legal rights of the parties and that that decision governed claims made subsequently where the same question arose, namely, the construction of the will. It cannot be contended, that this point of law, namely, the true construction of the will as to the destination of released funds, was not a matter 'directly and substantially in issue', in both suits within the meaning of S. 11 and yet it is difficult to see what question of fact was mixed up in it. It is to be noted too that the Board draw no distinction between questions of law and mixed questions of fact and law. In a case reported in *Rai Churn Ghose* v. *Kumao Mohon Dutta Chaudhuri* [1] the High Court held that the decision of a Court on the question whether rent was payable under S. 53 of the Bengal Tenancy Act quarterly or annually was *res judicata.* The Bench put it on the ground that it was a mixed question of law and fact. I find a difficulty in seeing the question of fact but the decision seems to me in entire accordance with *Badar Bee* v. *Habibe Merican Noordin* [2]. In *Bishnu Priya Chowdhurani* v. *Bhaba Sundari Debya* [3] the High Court held that a decision on the question whether a stipulation in a kabuliat was valid and binding between the parties was *res judicata.* All the cases were considered by Mookerjee, J. in an elaborate judgment reported in *Aghore Nath Mookerjee* v. *Kamini Debi* [4]. He applies the test of mixed question of fact and law to the construction of a clause in a will in which process I am, with respect, unable to follow him, but he says that the decision on the question of the true construction regulates the rights of the parties. That latter test seems to me the one applied in *Badar Bee* v. *Habibe Merican Noordin* [2], and also to give due effect to the words of S. 11 of the Code. The question has been recently considered by the Chief Justice in *The Secretary of State for India* v. *Maharajah of Venkatagiri* [5] and the Court had the decision in *Badar Bee* v. *Habibe Merican Noordin* [2] before it. The cases in *Mangalathammal* v. *Narayanaswami Aiyar* [6] and *Natesa Chetti* v. *Vengu Nachiar* [7] and all the Calcutta cases were also cited. The learned Chief Justice applies the decision of the

1. (1897) 1 C. W.N. 688.
2. (1909) A. C. 615.
3. (1901) I. L. R. 28 C. 323.
4. (1909) 11 C. L. J. 461.
5. (1916) 31 M. L. J. 97 at 117.
6. (1907) I. L. R. 30 M. 463.
7. (1909) I. L. R. 33 M. 102.

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Privy Council to the question of the right of Government to resume Inams in Zamindari and decides that such a decision can be said not to be *res judicata* on the ground that it is erroneous in law. It is to be noted that the Chief Justice does not apply the test of mixed question of fact and law. My conclusion is both on the authority of the Privy Council and on the language of the section that where a decision on a point of law whether it be on the construction of a document or of a statute or on common law or on customary law settles a question that arises directly out of conflicting views as to the rights of the parties it is *res judicata.* In this view I think that the cases in *Parthasaradhi Aiyangar* v. *Chinna Krishna Aiyangar,*[1] *Mangalathammal* v. *Narayanaswami Aiyar*[2] and *Natesa Chetti* v. *Vengu Nachiar*[3] cannot now be regarded as accurately expressing the law though they may be correct on the facts of each particular case, as they are inconsistent with *Badar Bee* v. *Habibe Merican Noordin*[4] and *The Secretary of State for India* v. *Maharajah of Venkatagiri*[5]. In this view the decision of the District Munsif in the 1902 suits that the Zamindar cannot by custom claim the payment of the charge without maintaining the tanks is *res judicata,* and the decision of the High Court in 1912 that that decision is *res judicata* is also *res judicata.* The appeals in 1108, 1110, 1115, 1118, 1124 will therefore be allowed with costs and the appeals Nos. 1109, 1111, 1113, 1114, 1116, 1117, 1120, 1123, 1125 will be dismissed with costs. The memo. of objections will be dismissed with costs.

Sadasiva Aiyar, J.

Sadasiva Aiyar, J;—I entirely agree. The actual decision in *Parthasaradhi Aiyangar* v. *Chinna Krishna Aiyangar*[1] might, perhaps, be supported on the ground that the decree in the plaintiff's favour in an injunction suit affects only the particular defendants who are parties thereto individually and that in a subsequent suit for injunction against other individuals, the questions decided in the first suit cannot be *res judicata* (see *Sadagopachariar* v. *Rama Rao*[6] and *Sadagopachariar* v. *Krishnamoorthy Rao*[7]).

I also think that Wallis, C. J., in *The Secretary of State for India* v. *Maharajah of Venkatagiri*[5] has clearly changed the views which he had expressed in the cases reported in *Mangalathammal* v. *Narayanaswami Aiyar*[2], and *Natesa Chetti* v. *Vengu*

1. (1882) I. L. R. 5 M. 304.
2. (1907) I. L. R. 30 M. 463.
3. (1909) I. L. R. 33 M. 468.
4. (1909) A. C. 615.
5. (1916) 31 M. L.J. 97.
6. (1902) I. L. R. 26 M. 376.
7. (1907) I.L.R. 30 M. 185 (P.C.)

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Nachiar [1] in the light of the Privy Council decision in *Badar Bee* v. *Habibe Merican Noordin* [2] and the decision of Mookerjee, J. in *Aghore Nath Mookerjee* v. *Kamini Debi*[3] though my Lord does not expressly say so. I might also refer to *Bishnu Priya Chowdhurani* v. *Bhaba Sundari Debya* [4] where the distinction is pointed out between the contention that the decision on an abstract question of law (say a question of limitation between the parties) in one suit is *res judicata* so that the law of the land should itself be deemed to have been altered when that question arises in subsequent suits between the same parties and the contention that a legal right, found declared or awarded in favour of one of the parties in one suit though based on an erroneous view of the law or an erroneous construction of a document is *res judicata* when the same legal right is controverted in subsequent suits between the same parties. The first contention is unsustainable while the second ought to be upheld. The memo. of objections will stand dismissed with costs, not being pressed.

PRIVY COUNCIL.

Present :—The Lord Chancellor (Lord Buckmaster), Lord Shaw, Lord Wrenbury and Mr. Ameer Ali.

[On Appeal from the Chief Court of Lower Burma.]

Maung Tun Tha ... *Plaintiff* Appellant.*

v.

Ma Thit and others ... *Defendants, Respondents.*

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Maung Tun Tha v. Ma Thit.

Buddhist Law—Succession—Right of the eldest (aurasa) son to a fourth share on his father's death—Whether it is a vested right or a mere option—Period within which it may be asserted—Indian Limitation Act (Act IX of 1908) *Schedule II, Art.* 123.

In Burmese Buddhist law the eldest (aurasa) son is on his father's death entitled to a definite one-fourth of the estate as against his mother and the other children, and so long as his mother lives, is at liberty to assert his right within the period allowed by Article 123 of the Indian Limitation Act for a suit for a distributive share of the property of an intestate.

Appeal from a decree of the Chief Court of Lower Burma dated March 31st, 1915, reversing a decree of the District Court of Thaton.

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* November 18th, 1916.

1. (1909) I L.R. 33 M. 468.
2. (1909) A.C. 615.
3. (1909) 11 C. L. J. 461.
4. (1901) I. L. R. 28 C. 318 (at p. 323.)

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U Tu, a Burmese Buddhist, died intestate on December 19th, 1906, leaving him surviving the Appellant, Maung Tun Tha, his eldest or aurasa son; his widow Ma Thit (the first Respondent), and various other children. For some years the widow Ma Thit managed his property, and was assisted in the management by Appellant. Thereafter disputes arose, and on June 26, 1913 Maung Tun Tha filed the present suit against the widow and other heirs of U Tu, claiming as aurasa son a quarter share in the estate including therein the properties which had been acquired and added thereto by the joint exertions of himself and Ma Thit.

Defendants filed a written statement denying that Plaintiff was an aurasa son and alleging that he had forfeited all right to inherit by his unfilial conduct. In paragraph 5 they alleged that if the plaintiff was entitled to a quarter share, "he exercised his election not to claim such share and cannot now do so."

The trial Court held on the evidence that Plaintiff was the aurasa son of U Tu and had not forfeited his right as such by unfilial conduct. The Trial Judge also held that he had under the Limitation Act 12 years within which to sue and that he had not abandoned his right. He therefore decreed the suit.

On appeal the Chief Court (Ormond and Twomey, JJ.) reversed this decision and dismissed the suit, on the ground that there had been unreasonable delay on the part of Plaintiff in asserting his right or as they styled it, "exercising his option." The material part of their judgment is as follows:

"The question in this appeal is whether an eldest son must act with reasonable promptitude in exercising his option of taking ¼ of his parents' joint property on the death of his father, or whether he has 12 years within which he can exercise that option under Article 123 of the Limitation Act." We are referred to the case of *Maung Po Min* v. *U Shwe Lu* [1], where it is held that the period of limitation for the recovery of ¼ share by an eldest son is 12 years from the date of the parents' death, under Article 123. The facts of that case are not given in the report; but we must assume that the eldest son's option had not lapsed owing to delay in exercising it. The effect of undue delay on the part of the eldest son was not considered and no question was raised on that

1. (1902) 2 L. B. R. 110.

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point. The case can only be regarded as an authority for applying article 123 and reckoning the period of limitation from the date of the parent's death when as a matter of fact the eldest son has acted promptly. In the present case we are not concerned with the period of limitation. If the Plaintiff had demanded his quarter share promptly after his father's death and had been refused he would no doubt have 12 years from the date of his father's death to sue for the share. But though he was a married man with a family of his own and living apart from his mother when his father died he did nothing for 6½ years and the question we have to decide is whether he should not therefore be deemed to have abandoned his claim to partition and elected to wait for his mother's death and then share with his brothers and sisters. It is not expressly provided in the Dhammathats that the eldest son must decide promptly which course he will take. But from the nature of the option it is necessary in the interests of the family that it should be exercised without delay. According as it is exercised or not the mode of managing the property must vary, and the prospects of the other heirs would also vary. It can hardly be intended that a widow should be compelled to keep quarter of the estate tied up indefinitely on the chance that any time within 12 years the eldest son may demand his ¼ share. Such a restriction would materially affect the widow's management of the estate. If such a course were admissible the eldest son might conceivably wait till ¾ of the estate has through some misfortune been lost and then claim the whole of the remaining quarter to the entire exclusion of his brothers and sisters although they may have counted for years on coming in when their mother dies and sharing equally with the eldest son."

"We think that the right given to the eldest son (Manukye Book X S. 5) of claiming a quarter share of the joint estate on his father's death must be exercised as soon as possible after that event and that if the option is not exercised without unreasonable delay it lapses altogether." Hence this appeal.

L. De Gruyther, K. C. for Appellant submitted that the Chief Court was wrong in holding that though not having sued for 6 years plaintiff had abandoned his claim to a quarter and could only come in with the other children on his mother's death.

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Burmese Law is contained in the Dhammathats, as to which see Lord Shaw's judgment in *Ma Huin Bwin* v. *U Shwe Gou* 1. The principal Dhammathat is the Manukye, which is followed in case of a conflict with others; but other Dhammathats are legitimate aids to interpreting it.

The rules of succession on the father's death are set out in S. 30 of the Kinwun Myingyis' Digest, Volume I. The right of the eldest son to a quarter share on his father's death is based on Manukye Book X rule 5. It has been held in Burma that on the father's death three-fourths vests absolutely in the mother, and no child except the eldest son gets a separate definite share (Digest Section 34). It is now suggested that the eldest son does not get the remaining ¼th, but has only an option, which must be exercised promptly. There is no authority for such a proposition. The ¼th share vests in the eldest son by inheritance on his father's death, irrespective of any claim by him. Attathankhepa, S. 155 (Page 4 in the English translation) as to the authority of which vide Chan Toon's Principles of Buddhist Law, p. 17.

[*Lord Shaw* asked if this proposition was disputed.]

[*Sir Erle Richards, K. C.*—We say the eldest son only has a right to claim partition, If he claims partition, he is entitled to ¼: but he must exercise his option within a reasonable time.]

Here Plaintiff has sued after 6½ years. The Indian Limitation Act, 1908, Art. 123 gives him 12 years. The Chief Court say I must assert my right to get a title: I say I have one already. The law gives me a share, and how have I lost it?

[*Lord Chancellor.*—The Chief Court's judgment does not deal with any point raised by the defence. The defence was that Plaintiff had elected not to claim his share, but I can find no election not to take].

Eddis followed.

Sir Erle Richards, K. C. for Respondents:—There is no joint family system in Burma. During the lifetime of the parents they hold the property jointly, but on the death or remarriage of either or on the death of both, rights to partition arise and can be exercised. This is quite different from the right to partition in India, which goes on from day to day.

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1. (1913) 41 I. A. 121.

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I say first that the eldest son must exercise his election—his right to partition—within a reasonable time; that he cannot lie by: and can drop his share by not claiming it: secondly, that his conduct in managing the family property shows that he acquiesced in the existing arrangement.

The eldest son's right is merely a right to claim partition. The judgment in *Ma On* v. *Ko Shwe O* (Ripley's Selected Judgments, 378) cited in Chan Toon, p. 104, says "on the death of one of the parents the eldest son "may claim". It is not every eldest son who inherits: certain classes are excluded: and the right is distinctly put as a right to claim, not to get. At p. 144 of Chan Toon it is laid down that the eldest child shares with the others on the death of both parents if he has not already obtained a division.

(*Eddis* referred to p. 143).

At p. 121 Chan Toon quoted a passage from the Attathankhepa, clearly contemplating that the eldest son who has not got his share shall come in with the others. Manukye Book X rule 12 uses the words "on demanding." Book X rule 14 clearly contemplates that the eldest son shall not take ¼ share, but a different share calculated as there set down,

The right of the eldest son to a special portion does not pass to his own heirs, but to the next eldest: this shows that it is not an ordinary right of inheritance.

Ma Mya v. *Maung Po Thin* [1]. In *Ma Su* v. *Ma Tin* [2] the stirps of the eldest son took not one-fourth, but the same as any other child.

[*Lord Wrenbury.*—The only decision there is that the grandchildren take *per stirpes.*]

The period for limitation for claiming is laid down in S. 51 of the Digest: it must be within 7 or 30 days after the funeral.

[*Lord Shaw.*—You are not entitled to raise this. It is not in your defence, nor in the judgment of either of the lower courts.]

These rules have not statutory authority, but they show the ideas of the Buddhist community. There is a distinct provision in that Section (p. 105) that "if the period of limitation is exceeded, the heir forfeits the right to claim it." Art. 123 of the Limitation Act does not apply: this is not a claim for a distributive share, but for partition. The eldest son has no vested right, but only

1. (1899) L. B. P. J. 585. 2. (1912) 6 L. B. R. 77 (84).

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a right to claim partition. He has two rights, he can claim partition now, or he can elect to claim it at his mother's death; he cannot let that state of things continue indefinitely, or for 12 years.

Coltman followed.—The widow takes not by partition, but by survivorship: so there is not necessarily a partition on the father's death. Rule 5 of the Manukye gives the eldest son the right to a quarter: rule 14 gives a right to all the sons on the mother's death. The passages have to be reconciled, and the most reasonable and just construction is to hold that the eldest son has an election, and must elect within a reasonable time. He now wants mesne profits for 6 years.

[*Lord Wrenbury.*—If the mother died within a fortnight would he lose his right ?]

Yes: I think so.

[*Lord Wrenbury.*—Then what becomes of the "reasonable time ?"]

The fact that he may lose his right in such a contingency gives him a motive to make haste.

No reply was called for.

Their Lordships' judgment was delivered by

Lord Buckmaster, L. C.

The Lord Chancellor:—The appellant in this case is the plaintiff in certain proceedings which were instituted in the District Court at Thaton, by which he claimed to have one-fourth share of the estate of his father determined and allotted to him. The claim is stated quite clearly, and with commendable brevity, in the plaint, which sets out allegations which are no longer in dispute, namely, that the plaintiff was the eldest son of his father; that his father died on the 19th December, 1906, intestate, and left a widow and certain other sons and daughters him surviving.

The ground upon which that claim was resisted depended in the main upon an allegation that the plaintiff has behaved in an unfilial and illegal way, and, consequently, had forfeited his rights. That defence was disposed of by the learned Judge who heard the cause, who, although he appears to have been greatly embarrassed by the untrustworthiness of the evidence before him, decided that the defendant had not established this allegation.

The only other matter left for decision was one which according to the defendants' contention, arose upon paragraph 5 of their defence. That paragraph suggested that the

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plaintiff had not in fact any share in the estate, but that, on the death of his father, he had obtained a right to elect whether he would have that share or no, and that, in the absence of election within a reasonable time, the claim could not now be brought forward. That view was supported by the Chief Court, and from their decision this appeal has been brought.

The whole of that contention depends, as Mr. Coltman very fairly stated, upon considering the two different rules of the Damathat which are applicable to this case. They are Rule 5 and Rule 14. The first relates to the partition of an estate upon the death of the father, and it is under that rule, that the right of the plaintiff in this case arises. It is in these words: "When the father has died the two laws for the partition of the inheritance between the mother and the sons are these: Let the eldest son have the riding horse" and certain ornaments, and it then proceeds; "Let the residue be divided into four parts, of which let the eldest son have one, and the mother and the younger children three."

It is said that Rule 14, which deals with the division of the estate on the death of the mother, shows that, if the one-fourth had not been segregated, and paid over to the eldest son after the father's death, and before the mother died, there would be a different method of distribution, one that might be more favourable, or that might be more favourable, to the eldest son, but which, certainly, would not be the same as that to which he was entitled under Rule 5.

Their Lordships do not think that it is desirable to express an opinion upon the true construction of Rule 14. It is a matter that may arise for determination hereafter, and its determination is not relevant to the present question because, even assuming in favour of the respondents, that the rights of the eldest son would change in the event of his not having segregated his one-fourth before his mother's death, it by no means follows that the right which he got under Rule 5 was merely the right to elect within a certain limited period of time whether he would take the property or no. Their Lordships can find no ground whatever for the suggestion that he got anything under Rule 5 excepting a definite one-fourth part of the estate, a right which he was at liberty to assert within any period that was not outside the

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period fixed by article 123 of the Indian Limitation Act as the period within which a claim must be made for a share of property on the death of an intestate.

The respondents have certainly urged before their Lordships all that could be urged in support of their view, but their Lordships find themselves quite unable to accept their arguments or to agree with the view which was formed by the Chief Court in this matter.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, the decree of the Chief Court set aside with costs, and the decree of the District Court restored.

The respondents will pay the costs of the appeal.

Solicitors for Appellant:—*Messrs. Sanderson, Adkin, Lee and Eddis.*

Solicitors for Respondents:—*Messrs. Arnould and Son.*

A. P. P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Oldfield and Mr. Justice Krishnan.

Gandla Nadiabba and another ... *Accused * in Calendar Case No. 42 of 1916 on the file of the Court of the Sub-Divisional 1st Class Magistrate of Chittoor.*

v.

Margasahaya Chetty ... *Complainant (Petitioner).*

Gandla Nadiabba v. Margasahaya Chetty.

Criminal Procedure Code, S. 250—Case instituted upon complaint—Meaning—Prosecution launched as result of information given to village Magistrate—Discharge of accused—order for compensation as against informant—Validity—Magistrate if includes Village Magistrate.

Under S. 250 of the Code of Criminal Procedure a Magistrate can when discharging the accused order compensation to be paid to him by the person who gave information to the Village Magistrate as the result of which the prosecution was launched.

Machimuthu Chetty v. *King Emperor* [1], followed.

Semble the term "Magistrate" in S. 250 does not include village Magistrates

Case referred for the orders of the High Court, under S. 438 of the Criminal Procedure Code, by the Sessions Judge of North Arcot in this letter, dated the 24th day of August 1916.

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* Cr. R. C. No. 575 of 1916. 13th October 1916.
(C. Ref. No. 81 of 1916.)

1. (1914) M. W. N. 804.

Gandla Nadiabba v. Margasahaya Chetty.

Krishnan, J.

Public Prosecutor for the Crown.

A. S. Venku Aiyar for Complainant.

The accused did not appear.

The Court made the following

Order:—*Krishnan, J.*—This is a reference by the Acting Sessions Judge of North Arcot which raises the question whether under S. 250 of the Code of Criminal Procedure a Magistrate can when discharging the accused order compensation to be paid to him by the person who gave information to the village Magistrate as the result of which the prosecution was launched. The facts as stated in the order of reference are that one Margasahaya Chetty made a written complaint Exhibit B to his village Magistrate charging the accused with the offence of robbery, that he, the Magistrate, sent up his usual reports to the police and to the 2nd Class Magistrate, and that the accused were thereupon prosecuted by the police, but the Sub-Divisional Magistrate who tried them discharged them under S. 253 of the Code of Criminal Procedure finding the charge against them to be false and vexatious and directed Margasahaya Chetty to pay a compensation of twenty-five rupees to each of the accused. The reference raised the question of the legality of the order giving compensation.

We have heard the vakil for the complainant, who argued that this was not a "case instituted by complaint as defined in" the Code of Criminal Procedure "or upon information given to a police officer or to a Magistrate" by his client and therefore S. 250 of the Code of Criminal Procedure did not apply. There are no doubt conflicting rulings in this High Court on the point. See *King Emperor* v. *Thammana Reddi* [1], *In re Arulanandham Pillai* [2] and Criminal Revision Case No. 627 of 1913 on the one hand, and the case of *Machimuthu Chetty* v. *King Emperor*.[3], on the other hand. I am inclined to think that the latest ruling on the point, *viz.*, *Machimuthu Chetty* v. *King Emperor* [3] which holds that in circumstances similar to those in this case the order of compensation is competent, is correct.

The question has, no doubt, to be decided on the words of the section giving them their plain and natural meaning. But even so if that language is considered carefully it seems to me to cover the order in question. The present case was undoubtedly instituted upon information given to the police and not by them

1. (1901) I. L. R. 25 M. 667. 2. (1912) 22 M. L. J. 188.
3. (1914) M. W. N. 804.

Gandla Nadiabba v. Margasahaya Chetty.

Krishnan, J.

of their own initiative *suo motu*. The fact that that information was transmitted to them by the village Magistrate cannot prevent the case from falling within the 1st part of the section. The only question then is whether Margasahaya Chetty can be held to be " the person upon whose complaint or information the accusation was made " so that the order of compensation may be made against him under the latter part of the section. It seems to me that his information was the whole foundation of the prosecution; and that there is no straining of the language in holding that the accusation was made on the information given by him to the police when the information given by him to the village Magistrate was communicated by the village Magistrate to the police as he was bound to do under S. 45 (cl. c,) of the Code of Criminal Procedure, the offence alleged being a non-bailable one. In the present case the written complaint, Ex. B, was itself handed over to the Police by the village Magistrate. Though I am not prepared to go so far as my learned brother, Ayling, J. as to hold that the Full Bench decision in the *Sessions Judge of Tinnevelly Division* v. *Sivan Chetty* [1] is "conclusive on the matter ", as that case was dealing with the construction of S. 211 of the Indian Penal Code whose language is not the same as that of S. 250 of the Code of Criminal Procedure. I think the observations in the judgment of the majority are very relevant here. The village Magistrate thereby acted as an intermediary to pass on Margasahayam's complaint to higher constituted authorities as he was bound to do. If Margasahayam is not the person upon whose information the accusation was made, the only alternative is that the village Magistrate should be held to be that person; no one has suggested that an order of compensation can be made against him; it will be absurd to do so. I therefore think that the order of compensation against Margasahayam is competent. As observed by Ayling, J. this view seems to be " in accordance with reason and equity and the true intention of the section. "

I am respectfully of opinion that the case of *Machimuthu Chetty* v. *King Emperor* [2] is correctly decided and I follow it. I desire however to guard myself against being understood as sharing in the doubts of my learned brother Seshagiri Aiyar, J. that the term Magistrate in section 250 may include village Magistrates, for S. 1, Cl. 2 (b) of the Code excludes its applicability to

1. (1908) I. L.R. 32 M. 258. 2. (1914) M.W. N. 804.

Gandla Nadiabba v. Margasahaya Chetty.

Krishnan, J.

them. My learned brother also refers to certain transfer sections under which the High Court transfers cases from one village Magistrate to another; it is not clear what these sections are as the High Court acts under the Letters Patent, S. 29 and not under the Code in making such transfers. See *Sevakolandai* v. *Ammayan* [1].

The learned judges have referred to the earlier cases in their judgments in *Machimuthu Chetty* v. *King Emperor* [2] and I agree in their observations regarding them. It does not therefore seem necessary to refer the question to a Full Bench. I would answer the reference that it was competent for the Sub-Divisional Magistrate to have passed the order of compensation as he did. The question whether on the merits the order was justifiable is one for the Sessions Judge to decide.

Oldfield, J.—I agree.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Napier.

Savarimuthu Pillai (died). *Accused* in calendar case No. 716 of 1915 on the file of the Court of the 2nd class Magistrate of Dindigul.*

v.

Muthu Pillai and another.

Savarimuthu Pillai v. Muthu Pillai.

Criminal Procedure Code, Ss. 350, 366 & 367. Judgment written, signed and dated by one Magistrate—Successor's obligation to deliver it—His right to do so—Accused's demand for de novo trial—Effect—Delivery of Judgment—What amounts to.

Whether or not the accused demands a *de novo* trial, a Magistrate is not bound to deliver a judgment written, signed and dated by his predecessor but not pronounced by him in open Court. *Sankara Pillai in re* [3] distinguished.

In the absence of any demand for a *de novo* trial it would have been in his discretion to do so.

Quære, whether it would have been legal for him to do so in the face of a demand for a *de novo* trial.

Under Ss. 366 and 367 of the Code a judgment is not delivered till it is written, signed, dated and pronounced in open Court.

Case referred for the orders of the High Court, under S. 438 of the Criminal Procedure Code, by the District Magistrate of Madura in his letter, A. O. C. No. 53 Mp. Mgl. of 1916 dated 10th February 1916.

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* Crl. R. C. No. 160 of 1916. 5th April, 1916.
(Case referred No. 19 of 1916.)

1. (1902) I. L. R. 26 Mad. 394 at p. 403.
2. (1914) M. W. N. 804.
3. (1908) 18 M. L. J. 197.

Savarimuthu Pillai v. Muthu Pillai.

Public Prosecutor for the Crown.

A. Venkatarayaliah for the 2nd accused.

The Court delivered the following

Ayling, J.

Order :—*Ayling, J.*—This case (Cal. Case No. 716 of 1915) on the file of the 2nd Class Magistrate of Dindigul was tried by Mr. D. K. Venkateswara Aiyar who heard all the evidence and adjourned it to 30-11-1915 for judgment. He also wrote and signed a judgment, adding the date (30-11-1915), but did not pronounce it as, when the case was called on 30-11-1915, one of the three accused was absent. The case was therefore adjourned to secure the attendance of this man. On 8-12-1915 all the accused appeared, but by that time Mr. Venkateswara Aiyar had been succeeded by Mr. N. Subramania Aiyar. The accused then demanded a *de novo* enquiry under S.350 of the Criminal Procedure Code and Mr. Subramania Aiyar apparently feeling doubts as to whether he would in such circumstances be justified in pronouncing his predecessor's judgment acceded to their demand.

The District Magistrate refers the case under S. 438 of the Criminal Procedure Code on the ground that Mr. Subramania Aiyar was bound to pronounce his predecessor's judgment and recommends that he should be ordered to do so, and that his order for a *de novo* trial should be set aside.

It seems to me that the District Magistrate has taken a wrong view of the law, and that the Sub-Magistrate was acting legally in deciding to hold a *de novo* trial. It was held by a bench of this court in *Sankara Pillai in re.*[1] construing S. 367 of the Criminal Procedure Code that a Magistrate did not act illegally in dating signing and pronouncing in open Court a judgment which had been written by his predecessor who had heard all the evidence. But there is nothing to indicate that the learned judges held it to be obligatory on him to do so; the question of how far his discretion would be fettered by the provisions of S. 350 of the Criminal Procedure Code was not considered at all.

Ss. 366 and 367 of the Criminal Procedure Code read together require that a judgment shall be (1) written (2) signed (3) dated and (4) pronounced in open Court; the latter three must take place on the same occasion. Till all these formalities have been

1. (1908) 18 M. L. J. 197.

Savarimuthu Pillai v. Muthu Pillai.

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gone through the judgment is not delivered, and there is nothing to prevent the Officer who wrote it from tearing it up and writing another. In this sense, it is incomplete.

The fact that the first Magistrate went so far as to sign and date the judgment he had written is immaterial, seeing that he did not pronounce it. S. 367 requires the dating and signing to be in open court at the time of pronouncement. The second Magistrate was therefore in exactly the same position on 8-12-1915, as if he held in his hands a judgment which had been simply written and left behind by his predecessor. In the absence of any demand for a *de novo* trial it would have been in his discretion to date, sign and pronounce this judgment. Whether it would have been legal for him to do so in the face of a demand for a *de novo* trial seems to me very doubtful; but that question need not be decided: That he was not bound to deliver his predecessor's judgment I am quite clear whether the accused demanded a *de novo* trial or not.

Whatever action he takes must be under S. 35 (1) which leaves it to his discretion. There is no specific provision in the Criminal Procedure Code corresponding to Order 20, Rule 2 of the Code of Civil Procedure under which it might be argued that the second judge was merely the mouth-piece of the first. A Magistrate who pronounces a judgment of his predecessor must in my opinion be taken to adopt it as his own. He cannot be compelled to do this.

In my opinion there is no ground for interference and the records should be returned to the District Magistrate.

Napier, J.—I agree.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Phillips.

Palaniappa Mudali and another ... *Appellants* * (*Vaidees*).

v.

The Official Receiver of Trichinopoly and another ... *Respondents* (*Official receiver and 1st Creditor*).

Palaniappa Mudali v. The Official Receiver of Trichinopoly.

Provincial Insolvency Act III of 1907, *Ss.* 16, 18, 36—*Insolvent—Father and grand-father of—Sale by all three—Application under S.* 36 *to set aside sale—Jurisdiction to set aside as regards shares of father and grand-father—S.* 46—*Order of Single Judge of High Court under—Letters Patent Appeal—Right of.*

Under Ss. 16 and 18 of the Provincial Insolvency Act the shares of the father and grand-father of an insolvent do not vest in the official Receiver, if they had not themselves applied to be declared insolvents And the court has therefore no jurisdiction under S. 36 of the Act to cancel a sale-deed executed by all three in so far as the shares of the father and grand-father are concerned.

There is a right of appeal against the decision of a Single Judge of the High Court exercising jurisdiction under S. 46 of the Act.

Appeal under clause 15 of the Letters Patent against the Judgment of the Honourable Mr. Justice Hannay in Civil Revision Petition No. 556 of 1913 presented to the High Court to revise the order of the District Court of Trichinopoly in Civil Miscellaneous Appeal No. 44 of 1912 I. P. No. 1 of 1911 on the file of the Court of the District Munsif of Namakkal.

T. Rangachariar and *K. S. Ganesa Aiyar* for Appellant.

S. T. Srinivasagopalachari for Respondents.

The Court delivered the following

Judgment:—We think the learned Judge rightly construed the finding of the District Judge in saying that there was a finding that the appellants were not *bona fide* purchasers.

The cancellation of the sale deeds in so far as they conveyed the share of the Insolvent was therefore right, but the order of the District judge as it stands may be construed as implying that the appellants acquired no interest at all in the properties comprised in the sale deeds. The shares of the grand-father and of the father of the Insolvent could not vest in the Official Receiver, as they never applied to be declared insolvents. Ss. 16, 18, and 36 of the Provincial Insolvency Act are clear on the point. Moreover the application of the Official Receiver was to cancel the sales only so far as the share of the Insolvent was concerned and the District Judge had no jurisdiction under the sections referred to, to

* L. P. A. No. 337 of 1914 11th July, 1916.

Palaniappa Mudali v. The Official Receiver of Trichinopoly.

deal with the other shares. We must therefore modify the order of the District Judge by declaring that the sale deeds are cancelled in respect of the share of the Insolvent only.

A preliminary objection was taken to the maintainability of the appeal on the ground that S. 46 of the act only gives the High Court a discretion to interfere and as against the exercise of such discretion by a Single Judge, there is no right of appeal.

The language of S. 46 of the Insolvency Act is practically the same as that used in S. 25 of the Provincial Small Cause Courts Act, and it is settled law now that as against the decision of a Single Judge exercising jurisdiction under that section, there is a right of appeal. The same principle must govern the decision under S. 46 of the Provincial Insolvency Act. We overrule the preliminary objection.

In the result, subject to the modification already indicated, the appeal is dismissed. We direct each party to bear their own costs throughout.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Srinivasa Aiyangar.

A. S. S. Subbaiya Pandaram ... *Appellant* * (*Plaintiff*)

v.

Mahamad Musthapa Maracayar and others. *Respondents* (*Defendants.*)

Subbaiya Pandaram v. Mahamad Musthapa Maracayar.

Limitation Act (IX of 1908) S. 10, Arts. 134, 142 and 144—Scope of—Public Trust—Charity—Sale of trust-property in execution of decree against trustee—Auction purchaser in possession for over 12 years—Suit for possession by succeeding trustee—Limitation—Trustee empowered to take a personal allowance out of the income of the charity properties—Effect of—Receiver—Possession of on behalf of successful party—Trespasser in possession of property as trustee—Ouster by fresh trespasser—Ejectment—Right of prior trespasser—Charity—Representation by trustee—Charity barred only when trustee barred.

One S. dedicated certain properties to a charity by two deeds of the year 1890 and 1894 respectively, under which S. and his heirs in order of seniority were constituted trustees of the charity and the trustee for the time being was empowered if he was so inclined to take Rs. 144 a year for his own use out of the income of the charity properties. S. died in 1895 and after his death a decree was obtained against his only son A. who was also the trustee of the charity, for a large sum said to be due from S. In execution of that decree the charity properties were attached and sold as the property of S., the first defendant being the purchaser. The first defendant obtained delivery of the properties in 1898 and continued in

* A. No. 19 of 1916. 31st August, 1916.

Subbaiya Pandaram v. Mahamad Musthapa Maracayar.

possession ever since. A, the son of S. was removed from the trusteeship in July 1913 and soon after, A's son the plaintiff, sued as trustee of the charity to recover possession of the charity properties on the ground that their sale for the payment of the personal debts of S. was void and that the first defendant had acquired no title by his purchase. It was alleged by the plaintiff that the first defendant purchased the properties in Court auction with the knowledge that they had been validly dedicated to charity, and that even when A. was the lawful trustee, the plaintiff, then a minor, was in possession of the charity properties until he was dispossessed by the defendant in the year 1898. It was found that in a prior suit brought by the plaintiff against the first defendant for recovery of the charity properties, the plaintiff had set up his possessory title but the Court had dismissed the suit on the ground that the plaintiff had no right to sue in ejectment.

Held that the suit brought by the plaintiff as the lawful trustee of the charity in succession to A. was barred by limitation either under Art. 142 or under Art. 144 of the Limitation Act; and that the plaintiff's claim based on possessory title must fail, the same having been set up and rejected rightly or wrongly, in the prior litigation between the same parties.

Held further, that the sum of Rs. 144 which the trustee for the time being was entitled to take out of the income of the properties, was not an interest in the charity properties which could pass to an alienee and by virtue of which the alienee could claim to hold possession of the charity properties during the period when the alienor remained a trustee. Consequently it was not open to the plaintiff to bring his action within 12 years after he became a trustee or to plead that the possession of the first defendant was not adverse to him or to the charity till the beneficial interest of A. of which the first defendant was the transferee, ceased.

Abhiram Goswami's case [1], *Narasaya Upada* v. *Venkataramana Bhatta* [2], *Muthuswamier* v. *Sree Sreemethanithi Swamier* [3], Referred to.

The exemption contained in S. 10 of the Limitation Act in favour of assigns for valuable consideration should not be restricted to *bona-fide* purchasers of the trust property without notice of the trust. In order to claim the benefit of Art 134 of the Limitation Act, it is not necessary that the transferee should have been entirely ignorant of the restricted nature of the transferor's title, but it is enough if the transferee takes that which is *de facto* a trustee's or mortgagee's limited interest upon the representation and in the full belief that it is an absolute title.

Radhanatha Doss v. *Gisborne* [4], *Singaram Chettiar* v. *Kalianasundaram Pillai* [5], Referred to.

Ram Kanai Ghosh v. *Rajah Sri Hari Narayan Singh* [6], followed.

The possession of the Court through a Receiver can only be on behalf of the party finally held by the Court to be entitled to the properties in dispute.

A person in possession without a title has the right to maintain his possession against all the world except the rightful owner. He can sue in ejectment and recover possession from any person who subsequently dispossesses him unless the latter is the real owner or claims under him. To such a suit, proof by the defendant that the real title is outstanding in a third party is no defence. In fact the prior possession is itself a root of title and the prior possessor has all the rights of a true owner except of course against the owner himself.

Asher v. *Whitlock* [7], *Perry* v. *Clissord* [8], *Sunder* v. *Parbati* [9], *Narayana Rao* v. *Dharmachar* [10], Referred to.

A charity is barred and can be barred only when its trustee or manager is barred, as the charity can only sue through a natural person.

1. (1909) I. L. R. 36 C. 1003.
2. (1912) 23 M. L. J. 260.
3. (1913) I.L.R. 38 M. 356=25 M.L.J. 393
4. (1871) 14 M. I. A. 1.
5. (1914) M. W. N. 735.
6. (1905) 2 C. L. J. 546.
7. (1865) L.R. 1 Q. B. 1.
8. (1907) A. C. 73.
9. (1889) I. L.R. 12 A 51.
10. (1902) I. L. R. 26 M. 514.

Subbaiya Pandaram v. Mahamad Musthapa Maracayar.

Jagadindra Nath Roy v. *Hemanta Kumari Debi* [1], Referred to.

Appeal against the Decree of the Court of the Temporary Subordinate Judge of Tanjore in Original Suit No. 61 of 1914.

T. R. Ramachandra Aiyar and *G. S. Ramachandra Aiyar* for Appellant.

The Hon. Mr. T. Rangachari, Mulim Sahib and *A. V. Visvanadha Sastri* for Respondents.

The Court delivered the following

Judgment:—This is an appeal by the plaintiff from the Decree of the Subordinate Judge of Tanjore dismissing the suit on the preliminary ground that it was barred by Limitation.

The case has not been fully tried and except where the facts are admitted we have to take the statements in the plaint as true for the present purpose. The facts which raise the question in dispute may be shortly stated.

One Subbaiya Pandaram acquired large properties in a salt trade and settled certain of his properties in trust for charity by two instruments, dated 21st February 1890 and 13th December 1894 and marked as Exhibits B and B 1 in the case. He had an only son Arunachela, the 3rd defendant and the plaintiff is his son. Subbaiya Pandaram constituted himself the 1st trustee and after his death his descendants according to seniority were to be trustees hereditarily. The trustee for the time being had the power, if he was so inclined, to take Rs. 144 a year for his own use out of the income of the charity properties and this power he had to exercise within three months after the close of the year. These are the only material terms of the trust deeds for the present purpose. Subbaiya Pandaram died in 1895 and after his death a decree was obtained against Arunachela for a large sum said to be due from his father Subbaiya and in execution of that decree the charity properties covered by both Exhibits B and B 1 were attached as the private property of Subbaiya. The plaintiff objected to the attachment in the execution proceedings and on his objection being rejected instituted a regular suit to establish the right of the charity. While that suit was pending, the properties were sold in execution sale and purchased by the 1st defendant who obtained possession in March 1898 and he is in possession down to this date. Arunachela was removed from the trusteeship in July 1913 and the plaintiff is now the trustee under the deeds of endowment. The plaintiff

1. (1904) I. L. R. 32 C. 129 (P. C.)

Subbaiya Pandaram v. Mahamad Musthapa Maracayar.

now sues as trustee of the charity to recover possession of the charity properties on the ground that their sale for the payment of the personal debts of Subbaiya was void and that the 1st defendant acquired no title by his purchase. He also charges the 1st defendant with knowledge that the properties which he purchased were charity properties. He says he was a minor till within three years before the action was brought. In these circumstances the 1st defendant having admittedly been in possession for over twelve years at the time when the action was brought and the charity represented by the then lawful trustee, the 3rd defendant who was under no disability, having been out of possession for over twelve years the question is whether the suit of the plaintiff is not barred by the Statute of Limitations. The plaintiff says no, and his case is put by his learned pleader in four different ways.

First he contends that the trustee for the time being is entitled to a beneficial interest to the extent of Rs. 144 a year, out of the charity properties which can legally pass to an alienee and that the execution sale did therefore pass an interest to the 1st defendant which came to an end only on the removal of the 3rd defendant from the trusteeship and that therefore on the principle of the decision of the Privy Council in *Abhiram Goswami's* case [1], as explained in *Narasaya Upada* v. *Venkataramana Bhatta* [2] and followed in *Muthusami Aiyar* v. *Sree Sreemathinithi Swamiyar avergal* [3] he was entitled to bring his action within twelve years after he became trustee and that the possession of the 1st defendant did not become adverse to him or to the charity till the beneficial interest of the 3rd defendant, of which the 1st defendant was transferee, ceased. This contention is, we think, untenable. The Rs. 144 which the trustee at his option is entitled to take is not an interest in the charity properties which can pass to an alienee and by virtue of which the alienee has a right to hold possession of the charity properties during the period when the alienor remains a trustee. It is really in the nature of a power which the trustee has to exercise from time to time and the trustee for the time being has no proprietary interest in the trust properties. This is the view which the plaintiff himself took for in paragraph 4 of his plaint he says "neither Subbaiya Pandaram nor his heirs have any proprietary right therein", that is, in the charity properties.

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1. (1909) 36 I. A. p. 148. 2. (1912) 23 M. L. J. p. 260.
3. (1913) 25 M. L. J. p. 393.

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Next he contends that there was no limit of time for the institution of this suit and that S. 10 of the Act applied. The argument, if we understood right, was that the 1st defendant was not an assign for valuable consideration, because though he is an assign and though he gave valuable consideration, he was not an 'assign for valuable consideration' within the meaning of the section as he had knowledge at the time of his purchase of the true nature of the property and that it could not be sold for the payment of the private debt of the trustee; in fact, unless he acted with good faith an assign for consideration is not an assign for consideration within the meaning of the section. There is no warrant for the introduction of additional words to qualify the plain meaning of the section and when we remember that the very words 'in good faith' which were found in the Limitation Acts of 1871 and 1859 were deliberately omitted in the Act of 1877, this introduction becomes still less permissible. The only authority cited is a case reported in *Rama Churn-Tewary* v. *Protap Chundra Dutt Jha* [1]. That decision was adversely criticised in *Rama Kanai Ghosh* v. *Rajah Sri Sri Hari Narayan Singh Deo Bahadur* [2] a case reported at p. 546 of the same volume where Mookerjee, J. examines the provisions of S. 10 and the cognate Article 134. We entirely agree, if we may say so with respect, with that exposition. It is true that in a case reported in *Singaram Chettiar* v. *Kalianasundaram Pillai* [3] the learned Chief Justice and Mr. Justice Hannay said they were unable to follow this ruling of Mookerjee, J. as they thought that it appeared to be at variance with the decision of the Privy Council in *Radhanath Doss* v. *Gisborne* [4] decided under the Act of 1859 and other decisions which followed it even after the words 'in good faith' were omitted in the Acts of 1877 and 1908. This observation is merely *obiter* and a careful perusal of the judgment of Mookerjee, J. shows that it is in no way inconsistent with the decision of the Privy Council or the other decisions which followed it as we shall shew presently. Mr. Ramachandra Aiyar relied on this and certain other decisions of this Court as to the meaning of the word 'purchaser' occurring in Art. 134 of the Act as throwing light on the meaning of the word assign for value, in S. 10; see *Singaram Chettiar* v. *Kalianasundaram Pillai* [3] and *Tholasinga Mudali* v. *Nagalinga Chetty* [4]. In these cases the meaning of the word 'purchaser'

1. (1886) 2 C. L. J. 448.
2. (1905) 2 C. L. J. 546.
3. (1914) M. W. N. 735.
4. (1871) 14 M. I. A. 1 at p. 16.

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as applied to a purchaser from a mortgagee was discussed. It is clear that an assignee merely of the mortgagee's interest is not a purchaser within the meaning of the article. It obviously means a person who purported to obtain an absolute title which the mortgagee purported to convey. Except in an English mortgage or a mortgage by conditional sale, the absolute title or the legal estate is not vested in the mortgagee; and except in a very limited class of mortgages the mortgagee has no power to sell the mortgaged property. (See S. 69 of the Transfer of Property Act). If therefore the assignee from a mortgagee knows that his assignor is only a mortgagee and that he could under no conceivable circumstances dispose of the absolute title, as for instance, in the case of an ordinary usufructuary mortgagee of properties outside the Towns specified in S. 69 of the Transfer of Property Act, that assignee may not be a purchaser within the meaning of the article. That is the utmost extent to which the cases take us. Lord Cairns delivering the judgment of the Privy Council in *Radanath Doss* v. *Gisborne* [1], said that a purchaser must mean 'some person who purchases that which *de facto* is a mortgage upon a representation and in the full belief that it is not a mortgage but an absolute title.' It is to be observed that 'good faith' is not said to be an element in the definition of 'purchaser'. That was another requisite required by the Act of 1859 to entitle a purchaser to take advantage of the shorter period of limitation prescribed by S. 5 of the Act; the 'full belief' need not be a *bona fide* belief. This is made quite clear at pages 17 and 19 of the report. At page 17 His Lordship says "In pleading a purchase for valuable consideration in this country, the very first averment in the plea is, that the person selling either was seised, or alleged that he was seised, for an absolute title and then the plea goes on to say, that being so seised, or alleging that he was so seised, he contracted to sell, and did sell and convey that absolute title, asserting it to be such, to the purchaser, who paid his money for that which was thus sold," and at page 19 after considering the terms of the deed of transfer by the mortgagee to the purchaser in that case, he says "Their Lordships can find in this deed no evidence of a statement on the part of the vendor or of any belief on the part of the purchasers that the property of the Maheeanwan estate was a property which the vendor claimed to hold by what we should call in this country a fee-simple title." It will be seen

1. (1871) 14 M. I. A. 1 at p. 16.

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that their Lordships nowhere say that if a transferee from a trustee or mortgagee knew that his vendor was a trustee or mortgagee he cannot be a 'purchaser' within the meaning of S. 5 of the Act of 1859 corresponding to art. 134. They merely use that fact as an element to be taken into consideration in determining the question whether in fact the transferee purported to purchase anything more than the mortgagee's interest. It must be remembered that a mortgagee as such has a transferable beneficial interest in the mortgaged property while a trustee as such has no such interest, though a trustee may also be a beneficiary under the trustee. Both in the case of a trustee and mortgagee the purchaser may have knowledge that his vendor is only a trustee or mortgagee; but they may purport to transfer the absolute title in the exercise of a power of sale and the vendee may purchase it knowing or having reason to believe that the trustee or the mortgagee was exercising that power mischievously or even fraudulently; at the same time he may bargain for and get a transfer of the absolute title. There can be no doubt that the purchaser in such a case obtains the sale in the full belief that what he is getting is a transfer of the absolute title; though at the same time he may know that if proceedings are taken against him he may not be able to retain his purchase; art. 134, in fact, assumes that the purchaser in possession could not resist a suit for recovery and that his title by purchase is not good. If good faith were required, the purchaser except in a very small number of cases (as for example, where the transfer is made in the exercise of a power *bona fide* assumed to exist by both parties though in fact there is no such power) would get a good title without the assistance of any law of limitation. So long as the legal title is transferred to the purchaser and possession given to him whether such title is transferred by virtue of the legal estate vesting in the trustee or mortgagee or by virtue of a special power, the transferee can take advantage of art. 134. So far at any rate as alienation of trust property is concerned there is no distinction between a private trust and a charity. In this matter the decision of the Privy Council in *Dhamodar Doss* v. *Lakhan Doss* [1] appears to be conclusive. There the two disciples of a deceased Mahant divided the properties of the Mutt which were trust properties to their knowledge, the junior chela obtaining a portion. It was held that

1. (1910) I. L. R. 37 C. 885.

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the possession of the junior chela was adverse to the senior chela and the trust which he represented, and the title of the charity was barred after twelve years of such possession. We must therefore disallow this contention.

The next contention is that the possession of the 1st defendant was not continuous for 12 years. It was said that in a previous suit between the parties (to which we shall have to refer hereafter on another point) the 1st defendant was appointed Receiver by the Court and that during the period when the 1st defendant was in possession as Receiver, his possession could not be said to have been adverse to the trust. In the first place there is no allegation in the plaint that the 1st defendant ever lost his possession after he got it in March 1898. Whether this so called interruption was before the 1st defendant perfected his title by 12 years possession or after, we do not know. As to the terms and conditions on which the 1st defendant was appointed, there is no statement. Mr. Ramachandrier says that his client will supply all these omissions at the trial, but the question is not one of proof, but of pleading. Assuming however that the 1st defendant was in possession as Receiver for some time during the pendency of the former suit, that suit having been admittedly dismissed, the 1st defendant now who was also the defendant in that suit could not be said to have lost his possession during his receivership. It is not contended that the 1st defendant quitted possession or lost possession and that nobody was in possession during that period, so as to revive the possession of the trust as in the case of *Agency Company* v. *Short* [1]. The possession of the Court through the Receiver can only be on behalf of the party entitled as finally settled in that suit and as the suit was dismissed, the possession must be deemed to have been on behalf of the 1st defendant himself, he being the successful party.

These are the points taken in respect of the claim of the plaintiff as the lawful trustee of the charity in succession to Arunachela his father who had been removed from the trusteeship in 1913. Article 134 of the Limitation Act, has been held by this Court to be inapplicable to a purchaser in court auction *Ahmed Kutti* v. *Raman Nambudri* [2]. We have held that S. 10 does not apply. The only other articles applicable are article 142 or 144. Whichever article applies, the 1st defendant having been

1. (1888) L. R. 13 A. C. 793. 2. (1901) I. L. R. 25 Mad. 99.

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in possession without any title whatsoever (for the case of the plaintiff is that the execution sale was absolutely void and conveyed no title whatever to the 1st defendant) the title of the trustee Arunachela and of the charity which he represented was extinguished. *Damodar Das* v. *Lakhan Das* [1]. The plaintiff as a successor has no fresh cause of action. The plaintiff's suit then as the successor of Arunachela in the trusteeship fails and must be dismissed.

But the plaintiff contends—that is the fourth point argued by Mr. Ramachandrier—that he has put forward an alternative claim to the possession of the lands on the ground of his prior possession, even when Arunachela was the trustee, and that the 1st defendant in fact dispossessed him when he (the 1st defendant) obtained delivery in March 1898 and in as much as he, the plaintiff, was a minor at the time of the dispossession and within three years of the institution of the suit, his claim to recover possession treating his prior possession as the root of his title is not barred. This raises an interesting question as to the rights of successive independent trespassers who have been continuously in possession if and when the title of the real owner is extinguished. The weight of authority is in favour of the view that in such a case the first trespasser gets the title and not the last who was in possession at the time when the title of the real owner became extinguished. It is now well settled that a person in possession without a title has the right to maintain his possession against all the world except the rightful owner; that he can sue in ejectment and recover possession—not merely in trespass—from any person who subsequently dispossesses him unless the latter is the real owner or claims under him or justifies under his authority; proof by the defendant that the real title was outstanding in a third party would be no defence. In fact the prior possession is itself a root of title and the prior possessor has all the rights of a true owner except of course against the owner himself, see *Asher* v. *Whitelock* [2] where *Doe* v. *Barnard* [3] is explained; *Perry* v. *Clissord* [4] *Sundar* v. *Parbati* [5] *Narayana Rao* v. *Dharmachar* [6]. It is equally well settled that the effect of the extinction of the title of the real owner is not to transfer

1. (1910) I. L. R. 37 C. p. 885.
2. (1865) L. R. 1 Q. B. p. 1.
3. (1849) 13 Q.B. p. 945.
4. (1907) A. C. 73.
5. (1889) I. L R. 12 All. p. 51 (P.C.)
6. (1903) I. L. R 26 Mad. p. 514.

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that title to the person in possession at the time of such extinction, though it is sometimes said that the adverse possessor for the requisite period obtains a title by statutory transfer. S. 28 of the Limitation Act like S. 34 of 3 and 4 Will. IV Cha. 27 merely extinguishes the title of the real owner, and the person in possession who had a right to retain that possession against all but the real owner in consequence of the extinction of the title of the real owner cannot be ousted thereafter even by the real owner and in that sense acquires a title by statute; but it is not an involuntary transfer by statute of the estate of the rightful owner though the title acquired by the trespasser may have the same legal character as that lost by the rightful owner. (See Dart's Vendors and Purchasers, Vol. I p. 473). *Cf. Tichborne* v. *Weir* [1] with *In re Nisbett and Potts Contract* [2]. From this it follows that if a prior possessor had a right to eject a subsequent trespasser so long as the title of the rightful owner was outstanding, that right could not cease to exist because that title becomes extinct by lapse of time. If then the prior possessor can eject the subsequent trespasser the title must be in the first trespasser unless of course the subsequent trespasser had obtained a title by adverse possession against the previous trespasser. This is the view taken by Sir F. Pollock, (see page 95 of his essay on possession) by Dart (Vendors and Purchasers p. 474) by Mr. Y. H. Carson (Real Property Statutes, p. 80) and by Mr. Lightwood, (Possession of land, p. 275. The case of *Asher* v. *Whitlock* [3] appears to decide this very point as will be seen from the various dates given in the report. The title of the real owner appears to have become extinguished by the lapse of 20 years when the widow of the original disseisor and her second husband were in possession; at that time she had no title to remain or retain possession as her interest ceased by her second marriage and her daughter was the person entitled. The daughter's heirs succeeded in ejecting the second husband of the widow, which they could not have done if the title vested in the widow or her second husband who were the subsequent trespassers in possession at the time when the title of the real owner was extinguished. The passage from Pollock on Possession was cited with approval by Lindley, L. J.

1. 67 Law Times p. 735. 2. (1906) I. Ch. p. 386.
3. (1865) L. R. 1 Q. B. p. 1.

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(as he then was) in *Dalton* v. *Fitzgerald* [1]. The only authority against this view are some observations of Lord Romilly in *Dixon* v. *Gayfere* [2] from which it appears His Lordship was of opinion that in law the person last in possession would acquire the legal title. The actual decision in the case does not touch the present question. These observations were dissented from in *Asher* v. *Whitlock* [3] where Cockburn, C. J. said "The Master of the Rolls may be right in equity, but I doubt his being right in law." It appears that when the Limitation Bill of 1877 was drafted it was proposed to add a section dealing with this matter but it was dropped (see Mitra, Vol. I, p. 445). On principle and on the authorities we think the plaintiff had a right to recover possession on his title based on his prior possession, and that right is not barred if the facts are as alleged by him. Mr. Rangachariar however contended that though this may be so in a case where the plaintiff claims the property beneficially, in this case as he sues to recover the property for the charity and inasmuch as the charity is barred by reason of the 12 years adverse possession suffered by the lawful trustee, the plaintiff's suit is barred. We think this is not correct. For the purpose of limitation the plaintiff must be taken to be suing for a personal right, though no doubt if he recovers possession of the properties he may have to hold them for the charity. The charity is barred and can be barred only when its trustee or the manager is barred, as the charity can sue only through a natural person (see *Jagadindranath Roy* v. *Hemanta Kumari Debi*, [4]). Mr. Rangachariar did not contend that as the 1st defendant obtained possession claiming under a sale in execution of a decree against the then trustee, (which sale must on the allegations in the plaint be taken to be a nullity) that the 1st defendant could have resisted any suit for possession by the plaintiff by virtue of his prior possession.

This conclusion of ours would necessitate a remand of the suit for a trial of this claim. But Mr. Rangachariar contends that as this very claim based on prior possession was put forward as a ground of claim in a previous suit, O. S. 16 of 1907 between the same parties, where also the present plaintiff asked for the same reliefs as he asks now and as that suit was dismissed the present claim is barred by the former adjudication.

1. (1897) 2 Ch. p. 86 at p. 90.
2. (1853) 17 Beav. p. 421.
3. (1865) L. R. 1 Q. B. p. 1.
4. (1904) I. L. R. 32 Cal. p. 129 (P.C.)

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Although this question was not dealt with by the lower Court, in order to avoid delay we decided to hear parties on this point in appeal and dispose of it here as the question is one of pure law. It depends entirely on the effect of the former Judgment, Exhibit G. The plaint in the suit has also been read to us by the appellant and we find the material portions, correctly set out in the Judgment G. In paragraph 12 of the plaint in that suit the present plaintiff in setting out his various titles for the reliefs claimed there, set up this very title of prior possession. The only relief asked for was possession of the properties sued for from the present defendants 1 and 2 who were also defendants 1 and 2 in that suit. The father Arunachala was made a party but no relief was asked against him and no relief by way of recovery of possesssion could possibly be asked, as admittedly he was not in possession. The Subordinate Judge of Negapatam in whose Court that suit was filed, the same Court in which the present suit also was instituted, held that the prior possession of the plaintiff even if true gave him no cause of action to recover possession of the properties till that prior possession was perfected under the statute of limitation against the real owner and disallowed the claim. Whether he was right or wrong in so holding, the decree dismissing the plaintiff's suit based *inter alia* on that claim is *res judicata*, and obviously prevents the plaintiff from again putting forward the same claim. The appellant agrees that this may be so, but as in this case, Arunachala who was the lawful trustee was a party to that suit, that decision cannot be *res judicata*; the right argument is that as the plaintiff cannot recover against the lawful owner by virtue of prior possession and he having been a party to that suit, that decision was perfectly right and that decision really held, that the prior possession was not good as a root of of title against a trespasser in the presence of the lawful owner. We are unable to accept this contention. It will be seen from the pleadings and the judgment in the previous suit, that though Arunachala was a party to that suit, he was only a nominal party; not even a declaration of title against him was asked—not that this would make any difference for the application of the principle of *res judicata*. The cause of action on the claim of prior possession was against the parties in possession and against them alone and it is against them that the suit was dismissed. We therefore

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think that this claim was not available to the plaintiff in the present suit.

Mr. Ramachandrier also contended that the respondent is not entitled to take this point now as he did not raise it in his written statement and if he had raised it then, the appellant have avoided the plea by pleading fraud, negligence or other ground of avoidance of the previous judgment. There is no basis for this contention. For the defendants have pleaded this very judgment as *res judicata* in paragraph 17 of their written statement and an issue (issue 10) has been raised on this plea. The plaintiff never pleaded that the previous judgment was not binding on him. We must therefore dismiss the appeal with costs.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Abdur Rahim, Offg. Chief Justice, and Mr. Justice Spencer.

M. K. Ramaswami Pattar ... *Appellant* (1st Plaintiff).*

v.

Gopalan styled Kallampalli Valia Nayar Avergal (dead) and others. *Respondents (2nd Plaintiff and Defendants.)*

Ramaswami Pattar v. Gopalan styled Kallampalli Valia Nayar.

Malabar Law—Karnavan—Right to recover lands in possession of junior members under an agreement by a former Karnavan in lieu of maintenance.

Where the junior members of a tarwad are in possession of some lands under an arrangement entered into by the former karnavan by which they were to enjoy the same in lieu of maintenance, the succeeding Karnavan cannot set aside the arrangement except for good cause.

A suit for possession of land granetd in lieu of maintenance cannot be maintained unless the succeeding Karnavan seeks to set aside the arrangement and offers to make some other suitable arrangement for the maintenance of the junior members.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Palghat at Calicut in A. S. No. 372 of 1914 preferred against the decree of the Court of the District Munsif of Alatur in O. S. No. 82 of 1913.

C. V. Ananthakrishna Aiyar for Appellant.

P. Appu Nair for Respondents.

* S. A. No. 958 of 1915. 20th September 1916.

Ramaswami Patter v. Gopalan styled Kallampalli Valia Nayar.

The Court delivered the following

Judgment:—The 1st plaintiff obtained a lease from the 2nd plaintiff the present Karnavan of the tarwad to which the defendants belong. It is found that the 1st plaintiff as a matter of fact, did not pay the Rs. 600 towards the consideration of the lease and the Munsif has also found that the lease was not a *bona fide* one. But it is contended by Mr. Ananthakrishna Aiyar that the question of consideration is not relevant so far as his client's right to recover possession from the defendants is concerned. The 2nd plaintiff on the decree being made dismissing the suit did not appeal against the decree. It is the 1st plaintiff that appealed to the lower Court. Therefore so far as the 2nd plaintiff is concerned even supposing that the 1st plaintiff had a *bona fide* lease we do not think that he is entitled to oust the defendants from possession. The defendants are in possession as junior members of the tarwad under an arrangement made sometime ago, by which they were given possession of this land in lieu of maintenance to which they were entitled. It has been held in *Yekkanath Eacharanunni Valia Kaimal* v. *Nanakkat Vasunni Elaya Kaimal* [1] that where there has been a *bona fide* arrangement of this character that arrangement is binding on the succeeding Karnavans and cannot be set aside unless for good cause: No such case is alleged in this case. Further it was ruled in S. A. No. 563 of 1905 that a suit for recovery of possession of land which has been granted in lieu of maintenance cannot be maintained unless the succeeding Karnavan seeks to set aside the arrangement and offers to make some other suitable arrangement for the maintenance of the junior members who are in possession of the land.

It is urged by Mr. Ananthakrishna Aiyar that Ayling and Seshagiri Aiyar, JJ. in S. A. No. 78 of 1915 have dissented from that view. Apparently the judgment in S. A. No. 563 was brought to their notice but the learned Judges do not discuss the question and do not say that they did not agree in the view of law laid down in S. A. No. 563. They only say that the offer of maintenance is not a condition precedent to the maintainability of a suit of this character. We think that the law as laid down in S. A. No. 563 of 1905 which is in accordance with the view expressed in *Yekkanath Eacharanunni Valia Kaimal* v. *Nanakkat Vasunni Elaya* [1] is reasonable and correct.

1. (1909) I. L. R. 33 M. 486.

The 3rd point argued by Mr. Ananthakrishna Aiyar is that the 1st plaintiff should at least have been given a decree for arrears of rent. But his main case was that the defendants were not entitled to possession and it was he that was entitled to possession under the lease. No doubt under Cl. 6 of the lease (Ex. A) the 1st plaintiff is entitled to recover the arrears of rent from the defendants for the year 1087 in lieu of interest on Rs. 500 which is said to have been paid by him.

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It has been found, however, by both the courts that he did not pay any such amount. That being the finding we see no force in this contention of Mr. Ananthakrishna Aiyar.

The result is, the appeal is dismissed with costs.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Ayling and Mr. Justice Napier.

J. Krishna Rao ... *Appellant* in calendar case No. 974 of 1915 on the file of the Presidency Magistrate's Court, Egmore.*

v.

The President of the Corporation of Madras. *Respondent in do.*

Krishna Rao *In re.*

Madras City Municipal Act III of 1904, S. 150—"Kept"—Meaning—Car under repair and unfit for immediate use—Tax on Legality.

The three phrases "kept" "let out for hire" and "used" in S. 150 are employed distinctively and the word "kept" is not qualified by the words "for hire."

A car does not cease to be "kept" within the meaning of S. 150 because it is under repair and for that reason unfit for immediate use. Under that section a tax is therefore leviable on such a car.

Case stated under S. 176 of Act III of 1904 by the Chief Presidency Magistrate, Egmore, Madras in Cal. case No. 9747 of 1915.

"Mr. Krishna Rao brought a motor-car in August 1914. Immediately after purchase it was handed over to a firm of motor car repairers as it was not then in running order. It was returned to him after repair only on the 9th September 1914. On these facts the Corporation assessed Krishna Rao on his motor-car for the half year ending September 1914 *viz.*, Rs. 25. This assessment was based on S. 152 (2) of the Act on the ground that "the vehicle had been for 30 days kept or let out for hire or used within the city." The Corporation contended that the car having been purchased in August 1914 was kept for more than 30 days.

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* Ref. C. No. 5 of 1916. 29th March, 1916.

Krishna Rao In re.

On appeal the Magistrate held that to keep a car was something more than to order a car and that though Mr. Krishna Rao owned the car from August 1914 he kept a car only from 9th September when the car was handed over.

"If this interpretation was not upheld a further question raised by the appellant will have to be considered *i. e.*, whether it was the keeping of a car or the keeping for hire that is referred to in S. 150 as a condition necessary for rendering a person liable to the tax."

R. N. Aiyangar for the Appellant.

P. Doraiswami Aiyangar for the Respondent.

The Court delivered the following

Ayling, J.

Judgment:—*Ayling, J.*—In my opinion the three phrases "kept", "let out for hire" and "used" in S. 150 of the Madras City Municipal Act are employed distinctively, and the word "kept" is not qualified by the words "for hire". If the mere possession of a car which is never used does not bring the possession within the scope of S. 150, it is difficult to imagine what is the object of the exemption clause, S. 151 (f).

I can see no ground for holding that a car ceases to be "kept" within the meaning of S. 150, because it is under repair and for that reason unfit for immediate use.

I would set aside the order of the Magistrates cancelling the tax and ordering refund.

Napier, J.

Napier, J.—I agree. Three points are argued. First that a car under repair is not a vehicle. I cannot take this argument seriously. Second that the word "kept" must be read with the words "for hire", and private persons who do not use for 30 days are not taxable. S. 150 (f) clearly negatives this argument. Thirdly, that as the owner had not the car in his possession, he was not "keeping". The section does not require the car to be in the possession of the owner. Any vehicle that is under some one's control is undoubtedly kept.

It has not been argued that if it was kept the owner need not pay and the argument would be impossible as long as the owner had control. Vide S. 150 (2) of the Madras City Municipal Act. The assessment by the Corporation is correct.

A. S. V.

PRIVY COUNCIL. *

Present :—The Lord Chancellor (Lord Buckmaster), Lord. Atkinson, Lord Wrenbury and Mr. Ameer Ali.

[On Appeal from the High Court of Judicature at Madras.]

Mutu K. A Ramanadan Chettiar ... *Appellant* †

v.

Vava Levvai Marakayar and others ... *Respondents.*

P. C.

Ramanadan Chettiar *v.* Vava Levvai Marakayar.

Mahomedan Law—Deed of Settlement—Wakf — Gift in perpetuity by a Mahomedan to his family, following a gift to charitable purposes—Under what circumstances such gift is valid—Tests to be applied to settlements prior to the Mussalman Wakf Validating Act, VI of 1913).

The Mussalman Wakf Validating Act (Act 6 of 1913) S. 3 expressly enacts that it shall be lawful for any person professing the Mussalman faith to create a wakf, which in all other respects is in accordance with Mahomedan Law "for the maintenance and support, wholly or partially, of his family, children or descendants."

But this Act though in terms declaratory, is not retrospective, and in the case of settlements prior to the Act such a gift is not *per se* a good and valid wakf. The test to be applied in such cases is that laid down in *Mujibunnissa* v. *Abdul Rahim* [1].

The gift will be valid if the effect of the deed is to give the property in substance to charitable uses. It will not be so if the effect is to give the property in substance to the testator's family.

To determine whether any particular case answers the test, all the circumstances existing at the date of the deed must be taken into consideration, such as the financial position of the grantor, the amount of the property, the nature and the needs of the charity, their probable or possible expansion, the priority of their claim upon the settled fund, and such like.

Appeal from a decree of the Madras High Court, dated 8th February 1910 affirming a decree of the District Judge of Tanjore.

In 1893 two Hanafi Mahomedans, A. N. Marakayar and A. K. S. Marakayar, settled a part of their property in trust to apply an indefinite part of the income to religious ceremonies and alms-giving and to apply the residue for the benefit of their descendants. Two paid trustees were appointed, each a son of one of the grantors. The provisions of the deed are analysed in a passage of the High Court's judgment cited by their Lordships.

Later on the grantors became embarrassed, and the appellant, who was their execution creditor, attached the settled lands. These being released on a claim by respondents, he brought the present suit for a declaration that he was entitled to bring them to sale in execution of his decree, and pleaded (a) that the deed was not valid as a deed of trust, (b) that it was executed to defeat and

* P. C. App. 115 of 1914. † 2nd, 3rd and 5th November 1916.

1. (1900) L. R. 28 I. A. 15 at p. 23=I. L. R. 28 A. 233.

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defraud creditors. The Subordinate Judge of Negapatam, who tried the suit, found (b) in the negative: as to (a) he held that the deed was valid only to the extent of Rs. 600 per annum at which he estimated the amount to be spent in charity and the remuneration of the trustees. Both sides appealed to the District Judge of Tanjore, who held that the gift to charity validated the whole of the deed and dismissed the suit altogether. An appeal by the creditor was dismissed by the Madras High Court (Benson and Abdur Rahim, JJ.), who held that the trust for the settlers' family failed, but that under Mahomedan law it followed that the entire income should go to the charitable uses, and that hence there was nothing for the creditor to attach. Hence this appeal. [For a full report of the proceedings in the High Court see 20 M. L. J. 254.]

L. De Gruyther, K.C., and Kenworthy Brown for Appellant. The whole settlement is bad. The High Court erred in holding that because the gift to the family was bad the whole property should go to charitable purposes. The gift to charity is illusory. The deed must be looked at as a whole. As to the nature of wakf, see Baillie's Mahomedan Law, p. 557. To be valid, a wakf must be primarily for religious or charitable objects. Where the primary object is to benefit the donor's family, this Board has always held that no valid wakf is created :

Ahsanullah Chowdhry v. *Amar Chand Kundu* [1], *Mujibunnissa* v. *Abdur Rahim* [2], *Abdul Fata Mahomed Ishak* v. *Russemey Duhr Chowdhri* [3].

Under this deed nothing is given for charitable purposes It is left entirely to the trustees to say what shall be given for Fateha, Kuthum &c. In substance the gift is for the benefit of the settlors' family, but there is annexed an obligation, more or less binding but very difficult to enforce, to spend an indefinite sum on charity.

[*The Lord Chancellor* drew attention to the inordinate delay on applicant's part. It appeared that the record was received in England in December 1914; and that in June 1916 the Board called on the Appellant to shew cause why the appeal should not be dismissed for want of prosecution].

If the charitable object is not illusory, I admit that the whole gift is good; but where it is illusory the whole is bad. The test is

1. (1889) L. R. 17 I. A. 28=I. L. R. 17 C. 496.
2. (1900) L. R. 28 I. A. 15=I. L. R. 23 A. 238.
3. (1894) L. R. 22 I. A. 76=22 C. 619.

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what is to become of the bulk of the property, and here the trustees can give to charity as much or as little as they please.

Kenworthy Brown followed :—A perpetual family settlement made by a Mahomedan is not valid as a wakf merely because there is an illusory gift to the poor, or even a trifling gift which is not illusory.

Meer Mahomed Israil Khan v. *Sashti Churan Ghose* [1] where the contrary view was taken, was overruled by this Board's decision in *Abdul Fata Mahomed Ishak* v. *Russemey Dhur Chowdry* [2].

The head note to the report of the latter case (*Abdul Fata Mahomed Ishak* v. *Russemey Dhur Chowdry* [2]) is wrong: it did not overrule *Bikam Mia* v. *Shuk Lal Poddar*[3] but merely the dissenting judgment of Mr. Ameer Ali; the decision itself is in my favour.

The gift to charity must be substantial; the gift of a small amount will not suffice, when the main object is to keep property in the family. *Maulvi Saiyid Muhammad Munawar Ali* v. *Rayia Bibi* [4].

It is sufficient that the amount devoted to charity should be reasonable, but here it is quite indefinite and illusory. The trustees have a discretion to set aside $\frac{1}{3}$ of the income for the purchase of immoveable property; and the income of such property will go to increase the portion of the family. The persons who have power to call the trustees to account are the very persons who are interested that the share of the family should be as large as possible. The High Court are not carrying out the settlors' intention in devoting the entire property to charitable purposes. We say (1) the settlors' dominant purpose was to provide for their family, (2) the provision for charity is illusory, (3) the settlors' intention was that the surplus left after expenditure on charity should be a separate fund for the benefit of their family only, not that it should go to the charitable objects named or to any charitable objects.

E. B. Raikes, for Respondents :—The plaint is badly framed. The trustees are not sued *qua* trustees, and the charitable interests are not represented. The proper procedure was to bring the Advocate-General on the record as representing the trusts. As the suit is framed the deed cannot be set aside.

1. (1892) I.L.R. 19 C. 412.
2. (1894) L. R. 22 I.A. 75 ; I L.R. 22 C. 619.
3. (1892) I. L. R. 20 C. 116.
4. (1905) L. R. 32 I. A. 86.

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[*The Lord Chancellor.*—It would be very undesirable at this stage to decide the case on that ground.]

Anything you decide now will not bind the Advocate-General. The public is not represented.

The trust is good. The attack upon the settlors' solvency at the time of execution has failed. They only got into difficulties later through losing a ship.

The cases cited for appellant merely show that a gift in perpetuity for a man's family is not valid for that purpose: they were useful before Act 6 of 1913. But it has never been held that where you settle a substantial part of your property on approved charitable objects, the residue cannot be settled in perpetuity on your family. That point was expressly reserved in *Ahsanulla Chowdry* v. *Amarchand Kundu* [1].

(The Lord Chancellor referred to *Phul Chand* v. *Akbar Yar Khan* [2].)

That is an express decision to the contrary. The gift to the children here is of the mere casual overflow. The provision for the trustees is ancillary to the charities and may be regarded as being itself a charitable purpose. The customary expenditure on the charities has been substantial, and that on fatehas would increase on the settlors' deaths. The reason why no amount is prescribed is because the funds available fluctuate. A fixed sum is not specified, because under the general provision all who seek must receive—Ameer Ali Mahomedan Law, (3rd Ed. 1904) p. 221. The surplus is not a definite thing. If the poor come and are refused alms, they could go to the Advocate-General and say that the primary trust was that they should be fed.

A wakf has been held valid, though 2/3 of the property was to go to the family, because the 1/3 which was to go to charity was not to be reduced. *Buzlal Ghani* v. *Adak Patari* [3]. Even when part of the wakf is bad, the charitable objects are always good. *Ahsanulla Chowdry* v. *Amarchand Kundu* [1] is the only case which has come before this Board where this has been held, but there are numerous decisions in India to the same effect.

If no salary were provided in the deed, the trustees could go to the Court for remuneration. The provision for accumulation

1. (1889) L.R. 17 I.A. 28; I.L.R. 17 C. 496. 2. (1896) I.L.R. 19 A. 211.
3. (1913) 17 C. W. N. 1018.

implies that the accumulations are to be held on the original trusts. The settlors have only settled 1/5 of their property, and there was no trust whatever for themselves.

Kenworthy Brown replied.

Their Lordships' judgment was delivered (December 1, 1916) by

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Lord Atkinson :—This is an appeal from the decree of the High Court of Judicature at Madras, dated the 8th February, 1910, affirming the decree of the District Judge of Tanjore, dated the 23rd April, 1906, which varied the decree of the Subordinate Judge of Negapatam, dated the 28th March, 1901.

The suit out of which the appeal arises was brought for a declaration that the plaintiff was entitled to bring certain lands to sale in execution of a decree obtained by him. The lands in question were comprised in a trust deed dated the 28th July, 1893, whereby they were settled substantially in trust to apply an indeterminate portion of the income for the due performance of customary *fatehas* for ancestors and to alms-giving, and to apply the residue of the income in perpetuity for the benefit of the defendants and their descendants without power of alienation.

The grantors in this deed, named Ahmed Naina Marakayar and Asan Kutu Saheb Marakayar were brothers. They were both Mahommedans of the Hanafi sect. At the date of the deed they were men of considerable means, owning property worth a lakh of rupees. The value of the land comprised in the deed was about one-fifth of that amount. Subsequently to the date of the deed they met with considerable losses. The appellant was their execution creditor, and in that capacity obtained the above-mentioned decree. If the deed of the 28th July, 1893, be absolutely void, he would be entitled to the relief he seeks; if it be not wholly void, his suit must fail.

This is all admitted. The respondents are the sons and grandsons of the two grantors. Those of them numbered 1 and 2 are respectively their sons. They are also the trustees named in the deed. Thus the sole question for decision in the case is whether this deed is a good and valid deed of wakf, or is wholly void. It has been found by the Subordinate Judge, before whom the case was tried, that the deed was not made to delay, hinder, or defraud creditors. That finding has not been questioned on this appeal. The case of the appellant is that the effect of the

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deed is to give the property comprised in it in substance to the grantors' family in perpetuity, and that it is therefore not a valid deed of wakf, while the case of the respondents is that its effect is to give that property in substance to charitable uses, and that therefore it is a good and valid deed of wakf.

The provisions of the deed are carefully analysed in the following passage in the judgment of the High Court :—

"The deed begins with a recital that the property, consisting of two villages of the total value of 20,000 rupees, is given for the purpose of charity, and then states that out of the gross yields the melvaram, repairs, salaries for servants, maganam, and other important expenses are to be defrayed; and the balance of the income is to be divided in three shares. From two shares out of the three shares of the income, the Dharmakartas or trustees appointed by the deed and their successors are to take 10 rupees per mensem as salary for discharging their duties; and as regards the remainder of the two shares, the direction to the trustees is as follows: 'You should perform annually without failure the customary (not "the annual" as wrongly translated in the paper book) *Pattah* (meaning *Fateha*), *Kuthum* (meaning *Khatam*), &c., for our ancestors and for us after our decease. You should annually give in the month of Ramzan to the *mesakins* or the poor *ojianam*, *i. e.*, food, *udumanam*, *i. e.*, clothes, *sadaka* meaning alms, *jaggath*, &c. The surplus should be divided in equal shares once a year by our heirs or their sons, grandsons in existence from generation to generation inclusive of you.' The third share of the income after paying the expenses is to be utilised in purchasing other immoveable property which is 'to be added to the said charity properties and dealt with according to the above terms'; and if in any year no immovable property is bought with the one-third of the net income, the amount is to be added to the two-thirds and 'divided according to the above particulars.' Two sons of the two executants were appointed Dharmakartas or trustees of the deed; and it is provided that their successors should be male members of the family not exceeding three in number; the heirs of the donors should be entitled to call upon the trustees to render proper account of the management, and to remove such of the trustees as may be guilty of mismanagement, and appoint competent men in their place. The Dharmakartas and the successors, the heirs, and the descendants are not to receive more than the shares allotted to them out of the income; and they will not be entitled to alienate the properties, nor will the properties be liable for their debts."

Their Lordships have little doubt but that the grantors executed this deed in the belief that the gift in perpetuity to their families and their descendants which it contains was according to the law governing the matter, namely, the Mahommedan Law, a good gift to a charitable use. There is a good deal of authority in support of that view, especially amongst the earlier writers, and by the Act VI, 1913, passed by the Governor-General of India in Council subsequently to the date of the decision appealed from the law in India has been brought into conformity, in this respect, with the opinion of these writers. By S. 3 of that statute it is expressly enacted that it shall be lawful for any person professing

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the Mussulman faith to create a wakf, which in all other respects is in accordance with the provisions of the Mussulman law, "for the maintenance and support, wholly or partially, of his family, children, or descendants." It was not contended that this statute affects the present appeal, and the following decisions of this Board, which their Lordships think they are bound to follow, clearly establish that the Mahommedan law, as interpreted by the Board, does not treat such a gift *per se* as a good and valid wakf. These decisions are *Ahsanulla Chowdry* v. *Amarchand Kundu and others* [1]; *Abdul Fata Mahomed Ishak and others* v. *Russomey Dhur Chowdry and others* [2] and *Mujibunnissa and others* v. *Abdul Rahim and Abdul Aziz* [3]. In this case (28 I. A. 15 at p. 23) Lord Robertson said:—

"Their Lordships have, however, considered the question whether even assuming it to have been registered, the deed is, according to its terms, a valid deed of wakf. It will be so if the effect of the deed is to give the property in substance to charitable uses. It will not be so if the effect is to give the property in substance to the testator's family."

All the Courts before which this case has come have adopted the test thus laid down by Lord Robertson, and its accuracy has not been questioned on this appeal. To determine whether any particular case answers the test, all the circumstances existing at the date of the deed must be taken into consideration, such as the financial position of the grantor, the amount of the property, the nature and the needs of the charity, their probable or possible expansion, the priority of their claim upon the settled fund, and such like. It was not shown, or indeed contended, on the hearing of this appeal, that the High Court was not right in its conclusion that a certain word in the trust deed which should have been translated as "customary," had in fact been translated "annual." No doubt this alleged mistranslation had not been pointed out either in the Court of the Subordinate Judge or in that of the District Judge, but their Lordships think they must assume that the Judges of the High Court satisfied themselves that the mistranslation had taken place, and are of opinion that under the circumstances the deed must now be read and construed as if the words "the customary" had been substituted at the place indicated for the words "the annual." The

1. (1889) I. L. R. 17 C. 496=L. R. 17 I. A., 28.
2. (1894) I. L. R. 22 C. 619=L. R. 22 I. A., 76.
3. (1900) I. L. R. 23 A. 233=L. R. 28 I. A., p. 15.

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Subordinate Judge at pages 327-329 classifies the charitable objects provided for in the deed under four heads :—

1. Cash doles to the poor on the 28th and 29th of the Ramzan month, which among Mahommedans is regarded as a holy month in which giving alms to the poor is enjoined as a duty.

2. Distribution of clothes to the poor on those days.

3. Distribution of *conjee* to the poor on a *misjed* during the thirty days of that month (Ramzan).

4. Performance of *fateha* on three days of ancestors, and feeding of friends and the poor.

The word "wakf" is not used in the deed, but it is not pretended that these objects are not, according to Mahommedan law, which governs the case, charitable objects, or that the grant to trustees to promote them did not create a good charitable trust. The trusts too are active trusts, troublesome to discharge, and the petty salary given to the trustees may accordingly well be held to have been given to them as remuneration for their trouble in this respect, and therefore as part of the expenditure on the charitable objects.

The Subordinate Judge estimated that it would be necessary to spend 230 to 260 rupees per annum on the first three of these charitable objects, and 100 rupees per annum on the fourth, making in all 360 rupees, which with the salary of the trustees, would amount to 600 rupees per annum, leaving, since the income of the trust estate was estimated at 1,500 rupees per annum, a balance of about 900 rupees per annum to feed the grant in perpetuity to the family and descendants of the grantors. Much stress was laid by the appellants on the fact that only two-fifths of the income would be devoted to the charity, while three-fifths would go to the family. But these figures may vary. They are not fixed and unalterable. The income may fluctuate or decrease permanently, and the needs of the charity may expand. The number of poor people usually relieved, which is put by the first defendant at 2,500 to 3,000, and by the third, fourth and fifth witnesses examined on his behalf at 2,000, may vastly increase, since their only necessary qualification is that they should be Mahommedans and be poor. It is not necessary that they should be inhabitants of any particular town or district, and it is obvious that the number of applicants for or objects of relief would tend to depend upon the distress prevailing amongst the Mahommedan population in the districts within reach of

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the place of distribution, namely, the home of the trustees. The expenses of the *fateha* will be increased by what has already occurred—the deaths of the two grantors. Well, the paramount purpose of the grantors was evidently to provide for all the needs of these charities up to the limit of the trust funds, the income received from the land. Those needs are the first burden upon that income. It is the residue, which may be a dwindling sum, that is given to the family. The contention that, because the share of the income going to the family is at present larger than that going to the charities, the effect of the deed is so to give the property in substance to the family, and that therefore it is invalid as a deed of wakf is, their Lordships think, entirely unsound.

It is next urged on behalf of the appellant that, inasmuch as no particular sum is named which the trustees are required to spend on any or on all of the charitable objects mentioned in the deed, they may spend on them as much or as little as they please, may, if they feel inclined, in fact, starve these charitable trusts, and that therefore the provision for charities is illusory. Well, their Lordships cannot at all take that view of the powers and duties of the trustees. As far as the *fateha* is concerned, it is to be the "customary" ceremony that the trustees are to perform without fail. Part of that ceremony is to feed the poor.

The trustees are, in their Lordships' view, at the least bound, so far as the funds under their control will permit, to make such provisions for the other charities as in the circumstances of the case a pious and charitable Mahommedan would consider reasonable and proper; and it is not disputed that, if the trustees failed to perform their trust, the Advocate-General, or some other authority having control over the administration of charities, could in a court of law compel them to do their duty and secure the due administration of the trust fund.

The sum devoted to these charities is according to any standard not large, though for the present it is abundant for their needs. Having regard to the wealth of the grantors at the date of the deed the provision made by it is a modest provision. Their Lordships take the view that, having regard to all the circumstances of the case, the dominating purpose and intention of the grantors in executing this deed evidently was to provide adequately for these charities. That was their main and

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paramount object. The secondary and subsidiary object was to secure for their families and descendants any surplus that might remain over after the needs of the charities had been satisfied, As the gift for the charities was perpetual, it was necessary and right that the provision for capturing any possible residue should also be perpetual. The provisions of the deed carry out these objects, and that being so, it is, in their Lordships' view, only right to hold that the effect of the instrument is not to give the trust property in substance to the family of the grantors, but to give it in substance to the charitable purposes named in it. If this be so, as they think it is, the deed is within the authorities a good and valid deed of wakf and must be allowed to take effect according to its tenor. The appeal therefore fails and must be dismissed, and their Lordships will advise His Majesty accordingly. The appellant must pay the costs.

Solicitor for Appellant:—*Douglas Grant.*

Solicitor for Respondents:—*Chapman, Walker* and *Shephard.*

A. P. P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS. [FULL BENCH.]

Present:—Sir John Wallis, Chief Justice, Mr. Justice Abdur Rahim, Mr. Justice Oldfield, Mr. Justice Srinivasa Aiyangar and Mr. Justice Phillips.

Kunhalloor Puthia Veetil Rayarappa Atioti — *Appellant* (1st Defendant's Legal Representative).*

v.

Vathukoilath Parkum Punnisseri Kelappa Kurup, and others. — *Respondents (Plaintiffs Nos. 1 and 2 and Defendants Nos. 12 and 58.)*

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Kunhalloor Puthia Veetil Rayarappa Atioti v. Vathukoilath Parkum Punnisseri Kelappa Kurup.

Malabar compensation for Tenant's Improvements Act (*I of* 1900) *Ss.* 5, 6 *and* 19—*Landlord and tenant—Compensation for improvements—Rate fixed by contract entered into before* 1*st January* 1886—*Effect of the Act.*

A contract entered into between a Malabar tenant and his landlord before 1st January 1886, according to which compensation is payable at certain rates therein specified, is valid and binding on them, whether the rates are more or less favourable to either party than the rates prescribed by the Malabar compensation for Tenant's Improvements Act.

When the question of the rate of compensation comes up for determination at a date after the introduction of the Act, it is not open to either party to a contract entered into before 1st January 1886, to elect to have the rates fixed according to the Act in preference to the rates mentioned in the contract.

* S. A. No. 838 of 1914. 30th November 1916.

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Obiter dictum in *Kozhikot Sreemana A. Vikraman* v. *Madathil Ananat Pattar* [1], *Paru Amma* v *Kunhikandan* [2] *Kochu Rabia* v. *Abdurahiman* [3] overruled.

Second Appeal against the Decree of the Court of the Subordinate Judge of North Malabar in Appeal Suit No. 370 of 1912, preferred against the Decree of the Court of the District Munsif of Badagara in Original Suit No. 714 of 1910.

The Court (Spencer and Phillips, JJ.) made the following ORDER OF REFERENCE TO A FULL BENCH :—

The question for determination in this case is whether the compensation for improvements is to be paid for at the rates stipulated for in the demises of 1876 or in accordance with the provisions of the Malabar Compensation for Tenants' Improvements Act. In the Full Bench ruling reported in *Randupurayil Kunhisore* v. *Neroth Kunhi Kannan* [4], it was held that in the case of a contract made prior to 1st January 1886, the rate of compensation is governed by the terms of the contract. In a subsequent case reported in *Kozhikot Sreemana A. Vikraman* v. *Modathil Ananta Patter* [1], Benson and Krishnaswami Ayyar, JJ., expressed an opinion (obiter) that if a contract as to the rate of compensation is unfavourable to the tenant even though it has been entered into before 1st January 1886, he is entitled to claim compensation under S. 5 of the Act at the rates prescribed in Ss. 9—18, and remarked that this opinion was not opposed to the Full Bench ruling in *Randupurayil Kunhisore* v. *Neroth Kunhi Kannan* [4], as the question therein answered was whether the making of the improvements after 1886 disentitled the tenants to the rates fixed by the contract before that date. This, we think, hardly expresses the matter correctly. Although the question in dispute in the suit was as to the rate payable for improvements made after 1886, the question referred to the Full Bench was couched in general terms as follows :—

"In the case of a contract made prior to 1st January 1886, is the rate of compensation which a tenant is entitled to receive governed by the terms of the contract or by the provisions of the Malabar Compensation for Tenant's Improvements

1. (1910) I. L. R. 34 M. 61=20 M. L. J. 849.
2. (1911) I. L. R. 36 M. 410=22 M L. J. 221.
3. (1913) I. L. R. 38 M. 589=26 M. L. J. 523.
4. (1908) I. L. R. 32 M. 1=18 M. L. J. 98.

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Acts of 1887 and 1900?", and the answer given was that in the case of a contract made prior to 1st January 1886, the rate of compensation is governed by the terms of the contract. This being so, we do not think that the facts of the case can warrant us in reading into the answer a modification that is not there, for the decision of the Full Bench is merely an answer to the question propounded and is not, unless expressly so stated, to be considered as a decision which must be construed as governed by the facts of the case in which the reference is propounded, when no reference is made to those facts in the question referred to the Full Bench. The same view of the law was followed by another Divisional Bench (Benson and Sundara Aiyar, JJ.) in *Paru Amma* v. *Kunhikandan* [1] and it was held that S. 19 of the Act referred only to contracts which took away or limited the right of a tenant both to make improvements and to claim compensation for them in accordance with the provisions of this Act, and not to contracts which merely regulated the amount of compensation that they could claim. In *Kochu Rabia* v. *Abdurahiman* [2] two other learned Judges of this Court (Sadasiva Aiyar and Tyabji, JJ.) thinking that the decisions in *Kozhikot Sreemana A. Vikraman* v. *Modathil Ananta Patter* [3] and in *Paru Amma* v. *Kunhikandan* [1] were not in accordance with the Full Bench ruling in *Randupurayil Kunhishore* v. *Neroth Kunhi Kannan* [4] and that the distinction drawn between the right of a tenant to make improvements and to claim compensation for them and his right to claim under an agreement which does not expressly refer to his power to make improvements was somewhat hypercritical referred the following questions to a Full Bench.

(1) "Whether a contract which is made prior to the 1st January 1886 and which regulates the rates of compensation claimable by the tenant for improvements or provides for methods of fixing the amount of compensation due to him (such rates or methods not being in accordance with the provisions in Ss. 5 and 6 of the said Malabar Compensation for Tenants' Improvements Act) but which does not expressly refer to the tenant's right to make improvements, is not binding on him if such a contract is less favourable to him than Ss. 5 and 6 of the

1. (1911) I.L.R. 36 M. 410=22 M.L.J. 221.
2. (1913) I. L. R. 38 M. 589=26 M. L. J. 523.
3. (1911) I. L. R. 34 M. 61.
4. (1909) I. L.R. 32 M. 1 (F. B.)

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Act, and whether the tenant is entitled to repudiate the contract and to claim compensation according to the provisions of the Act, and whether S. 19 of the Act affects such contracts."

(2) "Whether *Kozhikot Sreemana A. Vikraman* v. *Modathil Ananta Patter* [1], and *Paru Amma* v. *Kunhikandan* [2] have correctly interpreted the Full Bench decision in *Randupurayil Kunhisore* v, *Neroth Kunhi Kannan* [3]."

The reply of the Full Bench to the 1st question was that the contract mentioned therein was not binding on the tenant if it is less favourable to him than sections 5 and 6 of the Act. In reply to the 2nd question, the Court was of opinion that having regard to the question which the Court had to consider in *Randupurayil Kunhisore* v. *Neroth Kunhi Kannan* [3] there was no inconsistency between the judgment in that case and the judgments in *Kozhikot Sreemana A. Vikraman* v. *Modathil Ananta Patter* [1] and in *Paru Amma* v. *Kunhikandan*[2] and remarked in conclusion "we are not prepared to say that the last two cases were not rightly decided." It will thus appear that the prior ruling in *Randupurayil Kunhisore* v. *Neroth Kunhi Kannan* [3], was not dissented from, and as regards *Kozhikot Sreemana A. Vikraman* v. *Modathil Ananta Patter* [1] and *Paru Amma* v. *Kunhikandan* [2], it was held that they were not wrongly decided. In *Kozhikot Sreemana A. Vikraman* v. *Modathil Ananta Patter* [1], the case was decided quite apart from the opinion expressed *obiter* which the learned referring Judges in *Kochu Rabia* v. *Abdurahiman* [4] considered to be in conflict with the ruling in *Randupurayil Kunhisore* v. *Neroth Kunhi Kannan* [2] and in *Paru Amma* v. *Kunhikandan* [1] the contract under consideration was of a peculiar nature and did not merely regulate the rates of compensation. It would appear therefore that both the Full Bench rulings *i.e.*, in *Randupurayil Kunhisore* v. *Neroth Kunhi Kannan* [3] and in *Kochu Rabia* v. *Abdurahiman* [4], are still in force and are binding on us. The question for decision in the case before us now is whether the rate of compensation which the tenants are entitled to receive is to be governed by the contracts of 1876 or by the provisions of the Malabar Compensation for Tenants' Improvements Act. According to the decision in *Randupurayil Kunhisore* v. *Neroth Kunhi Kannan* [3], the tenants are entitled only to the rate of compensation contained in the contract. The question might

1. (1911) I. L. R. 34 M. 61.
2. (1911) I. L. R. 36 M. 414=22 M. L. J. 221.
3. (1902) I. L. R. 32 M. 1. (F. B.)
4. (1913) I.L.R. 38 M. 589=26 M L.J. 523.

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however be put in the form of the 1st question referred to the Full Bench in *Kochu Rabia* v. *Abdurahiman* [1] and according to the opinion expressed in that case the answer must be that the contract is not binding on the tenant if it is less favourable to him than Ss. 5 and 6 of the Act and consequently the tenants would be entitled to the higher rates provided in the Act. These two answers in the present case are directly conflicting, and as both the rulings are binding on us, the latter one not having in any way dissented from the former, we are in doubt as to which ruling to follow and think that the question should be again referred to a Full Bench. No doubt in *Abdulla Rowthan* v. *Raja Vasudeva Ravivarma* [2], one of the referring Judges in *Kochu Rabia* v. *Abdurahiman* [1], Sadasiva Aiyar, J. and Napier, J. interpreted the ruling on their reference as holding that the decision in *Randupurayil Kunhisore* v. *Neroth Kunhi Kannan* [3] should not be construed as negativing the tenant's right to claim compensation according to the Act if the terms of the agreement are less favourable to him, but we are unable to trace such a ruling in *Kochu Rabia* v. *Abdurahiman* [1] where it is only stated that *Kozhikot Sreemana A. Vikraman* v. *Modathil Ananta Patter* [4] and *Paru Amma* v. *Kunhikandan* [5] were not inconsistent with *Randupurayil Kunhisore* v. *Neroth Kunhi Kannan* [3], and were rightly decided. As we have pointed out *Kozhikot Sreemana A. Vikraman* v. *Modathil Ananta Patter* [4], was decided on quite a different point, and *Paru Amma* v. *Kunhikandan* [5], related to a contract of a somewhat peculiar nature unlike the usual contract regulating the rate of compensation. As regards the provisions of S. 19 of the Act and the opinion held in *Kozhikot Sreemana A. Vikraman* v. *Modathil Ananta Patter* [4], and in *Paru Amma* v. *Kunhikandan* [5], that the section only refers to contracts limiting the right to make improvements and to claim compensation and not to contracts merely regulating the rate of compensation payable, we would like to identify ourselves with the remarks made by the referring Judges in *Kochu Rabia* v. *Abdurahiman* [1], and would also add a further observation which seems to have escaped notice in the cases referred to above. S. 19 of the Act prescribes that contracts of a certain class made after 1st January 1886 shall be inoperative, but it is not apparent that

1. (1913) I. L. R. 38 M. 589=26 M. L. J. 523. 2. (1915) 29 M. L. J. 316.
3. (1908) I. L. R. 32 M. 1. 4. (1910) I. L. R. 34 M. 61.
5. (1911) I. L. R. 36 M. 410.

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the provisions of the section affect in any way contracts made before that date. Any contracts made before that date whether of the class referred to in S. 19 or of any other nature, must be considered and their validity determined according to law apart from any consideration of S. 19, which does not purport to be retrospective in effect. In the case therefore of a contract regulating the rate of compensation payable and entered into before 1st January 1886, the question for determination does not seem to us to be, whether it is a contract of the nature contemplated in S. 19 but whether it is a contract which is valid and binding according to law, and more especially the law as contained in S. 28 and other provisions of the Contract Act. If prior contracts of the nature specified in S. 19 are rendered invalid by reason of the passing of the Tenants' Improvements Act or are invalid in law for any other reason, S. 19 would appear to be superfluous, for contracts after 1st January 1886 would be invalid for the same reason and there is no reason for declaring their invalidity by a special provision of the legislature.

We therefore again refer the following questions for determination by a Full Bench as they are questions which are constantly cropping up and in many cases, as in the present one, large sums of money are involved.

1. When a contract has been entered into between a Malabar tenant and his landlord before 1st January 1886, according to which compensation is payable at certain rates therein specified, is such contract valid and binding on them, whether the rates are more or less favourable to either party than the rates prescribed by the Malabar Compensation for Tenants' Improvements Act?

2. When the question of the rate of compensation comes up for determination at a date after the introduction of the Act, can either party to a contract entered into before 1st January 1886 elect to have the rates fixed according to the Act in preference to the rates mentioned in the contract?

C. V. Ananthakrishna Iyer (*P. V. Parameswara Iyer*, with him) for appellants. Contracts of the kind specified in the questions referred are avoided by the Malabar Compensation for Tenants' Improvements Act. The Act is really retrospective. Act I of 1900 amends Act I of 1887 and the latter Act professes to secure to

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tenants the market value of their improvements. This could not have been intended to refer to future improvements alone. The Act is nothing, if not retrospective. The rates in Act I of 1887 were held applicable to pending suits and the customary rates were held to have no greater sanctity than express contracts. *Malikan* v. *Shankunni* [1]. S. 5 of Act I of 1900 clearly lays down that the tenant shall be entitled to the value of improvements and S. 6 fixes the mode of valuation to be according to Ss. 9 to 18. S. 19 is excluded and is not to govern S. 5. If in some cases S. 19 makes contract rates applicable, then S. 19 ought to have been mentioned in S. 6. Also S. 4 of Act I of 1887 which corresponds to S. 5 contained an express abrogation of custom. Such reference is now omitted in S. 5. Therefore custom and contract are on the same basis and both are abrogated by S. 5. If not, there is no provision in the Act abrogating custom. S. 19 really provides only against one particular mischief. The valuable right conferred on the tenant by Ss. 5 and 6 may be easily annihilated by the landlord contracting with the tenant that the latter shall not make any improvemnts at all. S. 19 prevents this and contemplates nothing else. If the object was to save past contracts fixing rates, nothing would have been easier than to enact an express saving clause.

The causes that led to the legislation and the object of the legislature in passing the Act are referred to in *Uthunganakath Avuthala* v. *Tharhatharayil Kunhali* [2]. Every compensation Act is more or less confiscatory and the policy of the present Act is to favour the tenant. The tenant is ordinarily to elect between the rates of the Act and those of the contract. This privilege exists in England under the Agricultural Holdings Act, 1883. *Newby* v. *Eckersley* [3], *Pearson and l' Anson, In re* [4], *Cathcart* v. *Chalmers* [5].

The cases on the point are all reconcileable and *Kochu Rabia* v. *Abdurahman* [6], lays down the law correcty. *Viru Mammad* v. *Krishnan* [7], held that contracts were inapplicable to improvements made after the Act. *Kerala Varmah Valia Rajah* v. *Ondan Ramunni* [8], merely decided that custom was not equivalent to a

1. (1890) I. L. R. 13 M. 502.
2. (1896) I. L. R. 20 M 435.
3. (1899) 1 Q. B. 465.
4. (1899) 2 Q. B. 618.
5. (1911) A. C. 246.
6. (1913) I. L. R. 38 M. 589.
7. (1897) I. L. R. 21 M. 149.
8. (1891) I. L. R. 33 M. 218.

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special contract. The effect of a special contract was not decided. *Randupurayil Kunhisore* v. *Neroth Kunhi Kannan* [1], held that the same contract rate applied to improvements made before and after the Act. The contract was assumed to be valid and its validity was not decided. *Kozhikot Sreemana A. Vikraman* v. *Modathil Ananta Patter* [2] and *Paru Amma* v. *Kunhi Kandan* [3], explain *Randupurayil Kunhisore* v. *Neroth Kunhi Kannan* [1] and decide that S. 19 does not refer to contracts fixing rates. Reference was made to *Oravikundiyil Parkum Elavana Tholan* v. *Kunhi Kutty* [4], *Vadakke Itivettiyakath* v. *Pallithanakath Veerankutti* [5], *Abdula Rowthan* v. *Rajah Vasudeva Ravi Varma* [6].

C. Madhavan Nair for respondents.

The decision in *Kerala Varmah Valia Raja* v. *Ondan Ramunni* [7], was under Act I of 1887 and it expressly decided that special contracts prescribing rates were saved by S. 7 of the Act and the legislature in enacting S. 19 in Act I of 1900 has not chosen to depart from the construction put upon S. 7 by that decision. *Randupurayil Kunhisore* v. *Neroth Kunhi Kannan* [4], is an express decision and lays down the correct law. *Kochu Rabia* v. *Abdurahiman* [8] is wrong in saying that *Randupurayil Kunhisore* v. *Neroth Kunhi Kannan* [4] does not decide the point. *Kozhikot Sreemana A. Vikraman* v. *Modathil Ananta Patter* [2], first strikes a note of dissent and the observations are *obiter*. S. 19 only invalidates contracts after 1886. The implication is clear that every contract before that date is saved.

The Court expressed the following

Opinion:—The decision of the Full Bench of four Judges in 1891 in *Kerala Varmah Valia Raja* v. *Ondan Ramunni* [7], proceeded upon the footing that the intention of the legislature was that contracts made before the date mentioned should stand unaffected by the Act, in other words that Ss. 5 and 6 (corresponding to Ss. 4 and 5 of the earlier Act) did not apply to cases governed by such contracts. This was expressly decided in *Viru Mammad* v. *Krishnan* [9]. If this contention was not in accordance with the intention of the legislature it would hardly have refrained from putting the matter right when repealing and re-enacting the Act

1. (1908) I. L. R. 32 M. 1.
2. (1910) I. L. R. 34 M. 61.
3. (1911) I. L. R. 36 M. 410.
4. (1913) M. W. N. 52.
5. (1914) 28 I. C. 679.
6. (1915) 29 M. L. J. 316.
7. (1891) I. L. R. 33 M. 218.
8. (1913) I. L. R. 38 M. 589.
9. (1897) I. L. R. 21 M. 149.

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with modifications in 1899. In 1908 it was again held by a Full Bench in *Randupurayil Kunhisore* v. *Neroth Kunhi Kannan* [1] that S. 19 (formerly 7) did not affect the validity of contracts made prior to the 1st of January 1886 whether the improvements were made before or after the coming into force of the Act of 1887. In 1910 Benson and Krishnaswami Aiyar, JJ. in *Kozhikot Sreemana A. Vikraman* v. *Modathil Ananta Patter* [2], whilst disposing of the case on another ground, suggested that, while prior contracts dealing with right to make improvements and claim compensation for them were saved under the Act, this was not the case with prior contracts dealing only with the rates at which compensation was to be paid. This view was adopted in *Paru Amma* v. *Kunhikandan* [3], by Benson and Sundara Ayyar, JJ. who refused to give effect to a contract made prior to January 1886 which did not restrict the tenant's right to make improvements but only the rates payable for such improvements. In 1913 Sadasiva Aiyar and Tyabji, JJ. referred to a Full Bench the questions whether such contracts were enforceable, and whether the two last mentioned decisions were consistent with the Full Bench decision in *Randupurayil Kunhisore* v. *Neroth Kunhi Kannan* [1]. The Full Bench answered without assigning reasons that such contracts were not enforceable if less favourable to the tenant than Ss. 5 and 6 of the Act, and that the decisions in *Kozhikot Sreemana A. Vikraman* v. *Modathil Ananta Patter* [2], and in *Paru Amma* v. *Kunhikandan* [3], were not inconsistent with the Full Bench ruling in *Randupurayil Kunhisore* v. *Neroth Kunhi Kannan* [1]. The question has again been referred to a Full Bench by Spencer and Phillips, JJ. on the ground that the Full Bench decision in *Kochu Rabia* v. *Abdurahman* [4], is inconsistent with the earlier Full Bench decision in *Randupurayil Kunhisore* v. *Neroth Kunhi Kannan* [1], and that they are in doubt which to follow and has now come before a Bench of five Judges.

After hearing the whole question reargued we agree with the referring Judges in *Kochu Rabia* v. *Abdurahman* [4] and in the present case that the view advanced in *Kozhikot Sreeman Vikraman* v. *Modathil Ananta Patter* [2] and adopted in *Paru Amma* v. *Kunhikandan* [3] and accepted by the Full Bench in *Kochu Rabia*

1. (1908) I. L. R. 32 M. 1.
2. (1910) I. L. R. 34 M. 61.
3. (1911) I. L. R. 36 M. 410.
4. (1913) I. L. R. 38 M. 589.

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v. *Abdurahman* [1] cannot be supported. S. 19 (formerly 7) which deals in terms with future contracts cannot in our opinion be construed as dealing only with contracts which take away or limit the right of a tenant to make improvements and also limit his right to claim compensation for them under the Act, but applies equally to contracts which take away or limit either of these rights. It is we think clear that the legislature intended to prohibit all future contracts taking away or limiting either or both of these rights. It is well settled that the word " and " may be read as " or " where it is necessary to do so in order to carry out the obvious intention of the legislature (Maxwell on Statutes, p. 331, 3rd Edition). The existence of a proviso excluding from the operation of the section a particular class of contracts dealing with the compensation payable under the Act, and the insertion of the word " to " before " claim " when the original section 7 was re-enacted as section 19 also support this view. If, as we hold, contracts, affecting only the right to claim compensation come within the section, the suggested distinction fails, and we are bound following the uniform course of decisions in this Court to answer the first question referred to us in the affirmative and the second in the negative.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Oldfield and Mr. Justice Sadasiva Aiyar.

Kovvidi Sattiraju ... *Appellant** (*2nd Defendant*)

v.

Patamsetti Venkataswami and others. *Respondents* (*Plaintiff and 1st defendant and suppl. respondent*).

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Hindu Law—Adoption by widow of eleven years of age under authority from her deceased husband—No exercise of discretion—Absence of disinterested advice from guardian—Adoption void—Ratification, if possible.

Where a Hindu widow of about eleven years of age who had been authorised by her husband's will to adopt, if and when she chose, purported to adopt a boy and it was found that she exercised no discretion in the matter of adoption and at her age at the time, was incapable of exercising any discretion and that her father who acted as her guardian did not give disinterested advice in the matter of adoption, *Held*, that the adoption was void and was incapable of being validated by subsequent ratification.

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* C. M. A. No. 104 of 1915. 11th October 1916.

1. (1913) I. L. R. 38 M. 589.

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The authorities on the point discussed.

Per Curiam.—The age of majority for both males and females under the Hindu Law commences at the age of 16, that is on the completion of the 15th year.

Per Sadasiva Aiyar, J.—According to Hindu Law, a widow has not got the legal discretion to adopt a boy to her husband before she finishes the 15th year of her age.

Where it is left to the sole discretion of a widow to adopt, her discretion could not be displaced by her guardian's advice, however disinterested.

Appeal against the order of the Court of the Subordinate Judge of Cocanada dated the 31st December 1914 in Appeal Suit No. 119 of 1914, preferred against the decree of the Court of the District Munsif of Cocanada in O. S. No. 624 of 1912.

[The facts are stated in the judgment.]

B. Narasimha Rao for the appellant, after stating the facts of the case submitted that, on the findings of both the lower Courts the adoption was void *ab initio* and incapable of ratification by the widow. Their Lordships thereupon called upon the respondent.

S. K. Parthasarathy Aiyangar for *Mr. V. Ramesan* for the respondents:—The adoption by a minor widow is not void but only voidable and so could be ratified on attainment of the majority by the widow. *Ranganayakamma* v. *Alwar Setti* [1], *Sri Rajah Venkata Narasimha Appa Rao* v. *Sri Raja Rangayya* [2], *Somasekhararaja* v. *Subhadramayi* [3]. The fact that the widow was a minor does not affect the question. Adoption is in the nature of an onerous gift to a minor which the minor may ratify or repudiate on attaining majority. See Transfer of Property Act S. 127 (3), Contract Act, S. 248. *Shri Sitaram Pandit* v. *Shri Harihar Pandit* [4]. A gift can be accepted by or on behalf of the donee. A donor can also accept on behalf of the donee. *Bhupati Nath Smrithi Tirtha* v. *Ram Lal Maitra* [5]. Adoption consists of two parts (1) the physical Act of taking and (2) the mental act of acceptance or consent. The first is done by the minor widow while the second is done by her guardian. A guardian can annex his consent to the act of the minor widow. *Ranganayakamma* v. *Alwar Chetti* [1]. The widow in adopting acts as the agent of her husband, her minority being no disqualification to her being an agent. Under the Hindu Law a widow can adopt at the age of discretion. The age of discretion for a female is given in Kautilya's Arthasastra Book 3 Chap. 3 Sl. 41 as the

1. (1889) I. L. R. 13 M. 214
2. (1905) I. L. R. 29 M. 437.
3. (1882) I. L. R. 6 B 524.
4. (1910) I. L. R. 35 B. 169 at 179, 180.
5. (1909) I. L R. 37 C. 161.

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beginning of the 12th year. 11 years is prescribed as the marriageable age for a girl by the Dharmasastras. Maturity of understanding is to be presumed in the case of a girl between 8 and 12 years of age, see S. 83 of the Indian Penal Code. In this case the minor widow was 11 years and 3 months old at the date of adoption and the presumption is therefore strong. Moreover, the widow stands by the adoption even after she attains majority. The opinion of the late Mr. Sarkar Sastri in page 215 A of the second edition of his book on Adoption is in favour of recognising the validity of an adoption by a minor widow.

B. Narasimha Rao in reply. The Privy Council decision in *Amrito Lal Dutt* v. *Surnomoyi Dasi* [1], puts it beyond doubt that it is the widow alone and not a guardian on her behalf that can adopt. The concurrent finding is that the girl was of immature understanding. The adoption is therefore void and no ratification can validate it. The dictum in *Ranganayakamma* v. *Alwar Chetti* [2], that a guardian's consent is a substitute for the widow's exercise of discretion, is not good law and is opposed to the decision of the Privy Council.

The Court delivered the following

Sadasiva Aiyar, J.

Judgments:—*Sadasiva Aiyar, J*:—The 2nd defendant is the appellant in this case. The plaintiff brought the suit for possession of the plaint lands as lessee from the 1st defendant who, the plaintiff alleges, was the adopted son of one Subbarayadu who died in 1907, having by his registered will executed shortly before his death, given authority to his widow, Viyyammal, about 11 years old at that time, to make an adoption if, and when, she chooses. The 1st defendant is still a minor and the lease relied upon by the plaintiff was by his alleged adoptive mother's father acting as guardian of the 1st defendant and is dated July 1912. Viyyammal attained majority in February 1914, about 1½ years after this suit was brought. The 1st defendant's adoption is said to have taken place in May 1907 very soon after her husband's death. One of the defences raised in the case is that the 1st defendant was not validly adopted to Subbarayadu by Viyyammal and that therefore the plaintiff cannot maintain the suit as the 1st defendant's lessee. The District Munsif held that the 1st defendant's adoption was invalid and dismissed the suit. I think it

1. (1900) I. L. R. 27 C. 996. 2. (1889) I. L. R. 13 M. 214.

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convenient to consider at this stage some of the important precedents on this point. (a) In *Mondakini Dasi* v. *Adinath Dey* [1] it was held that an adoption by a widow who was a minor at the time, that is, who had not attained her 18th year according to the Indian Majority Act would be valid provided the widow had attained sufficient maturity of understanding to comprehend the nature of the act, (especially if her husband had indicated the boy to be adopted and left her no discretion in the matter of 1st defendant's adoption and it is found by both courts that Viyyammal was only about 11 years old, she had not attained sufficient maturity of understanding to exercise a proper discretion as to the boy to be adopted. Hence the adoption is invalid if her discretion was a *sine qua non*). (b) In *Ranganayakamma* v. *Alwar Chetti* [2], it was held that a 13 years' old widow had not sufficient discretion of her own to choose a proper boy for adoption, but that the 'intelligent and disinterested guidance of her legal guardian seeking *bona fide* to provide for a spiritual necessity with due regard to her interest so far as it is compatible with such necessity,' can take the place of her own discretion. "There must, however, be cogent evidence of such intelligent and disinterested guidance". These observations were, however, *obiter dicta* as the adoption in that case was set aside on the ground that the consent of the widow of 13 years of age was obtained by coercion and she repudiated the adoption in the suit. (c) In *Jumoona Dassya* v. *Bamasoondari Dassya* [3], it was held that a youth of 15 or 16 had attained years of discretion according to Hindu Law and is capable of giving permission to his widow to adopt though, not having attained the age of 18 years, he was a minor for most other purposes. (d) In *Sri Rajah Venkata Narasimha Appa Row* v. *Sri Rajah Rangayya Appa Row* [4], this Court (Davies and Benson, JJ.) held that an adoption made by a *major* widow under coercion is only voidable by her and can be ratified by her; but when that case went up on appeal to the Privy Council, (*Narasimha* v. *Parthasarathy* [5]) the adoption was set aside on some other ground (namely that the power given by the husband to the two widows jointly had lapsed by the death of one of them) and their Lordships had not to consider the question whether an adoption made under coercion can be

1. (1890) I. L. R. 18 C. 69.
2. (1889) I. L. R. 13 M. 214.
3. (1876) I. L. R. 1 C. 289.
4. (1905) I. L. R. 29 M. 437.
5. (1914) I. L. R. 37 M. 199.

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ratified by a major widow. (e) In *Amrito Lal Dutt* v. *Surnomoye Dasi* [1], their Lordships of the Privy Council state that a husband could not give power to anybody except his widow to make an adoption. I shall quote the following passages from that judgment:—"That no one can adopt a son to a dead man except his widow is such a rudimentary principle of Hindu Law, and one so constantly occurring in ordinary life, that it is difficult to suppose any educated man to be ignorant of it. That the widow's choice of a boy may be restricted in *various ways*, and among them by requiring the consent of persons named by the husband, is also familiar law." The learned District Munsif found as a fact in this case (a) that Viyyammal exercised no discretion in the matter of the adoption and (at her age at the time) was not capable of exercising any discretion; (b) that her father who acted as her guardian did not give disinterested advice to her in the matter of the adoption; (c) that the authority to adopt given by the husband required as a *sine qua non* the exercise of her own discretion that is, the power to adopt was so *restricted* by the husband that it could be exercised only according to her own discretion and that even if the substitution of the guardian's disinterested advice allowed by *Ranganayakamma* v. *Alwar Chetti* [2] could be applied, there was no such disinterested advice given in this case the advice (if any was given) having been very much interested.

On appeal, the learned Subordinate Judge "quite" agreed with the District Munsif that Viyyammal was not at the time of the alleged adoption of an age which rendered her capable of exercising her own discretion in the matter of the adoption and that the advice of her legal guardian was not at all disinterested. He did not deal with sufficient clearness with the question whether the power given to her by her husband did not require as a *sine-qua non* the exercise of her own discretion. He found that Viyyammal's father did not give her an opportunity to exercise her own discretion in the matter and did not even consult her about the desirability of adopting a boy. But he remanded the suit to the District Munsif in order that, as she was, on the date of the Subordinate Judge's judgment, nearly 19 years old and was in a position to state whether she would ratify the act that was done when she was eleven years old, she might be asked whether she

1. (1900) I.L. R. 27 C. 996. 2. (1889) I. L. R. 13 M. 214

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ratified the act of adoption and that then the suit might be decided. Against this remand order, the present appeal has been filed by the contesting defendants. Several interesting questions of Hindu Law were discussed during the course of the arguments in this case, and I shall shortly state my views thereon, though I believe that for the decision of this case, it is unnecessary to express a final opinion upon most of these questions.

The Indian Majority Act fixing 18 years as the age of majority says in section 2, "Nothing herein contained shall affect the capacity of any person to act in the following matters:—(*a*) marriage, dower, divorce and *adoption*." We have therefore to turn to the Hindu Law as to the age of capacity of a person to make a valid adoption. The age of majority for both males and females according to Hindu Law, in my opinion commences at the age of 16 (Praptetu Shodase Varshe) that is on the completion of the 15th year. (See *Mothooramohun Roy* v. *Soorendro Narain Deb* [1] and also *Madhusudan Manji* v. *Debi Govinda Newgi* [2]). Though the parents *can give* a girl in marriage before she completes her 15th year, the real and final *marriage* in the days of the old Hindu Law took place when both bride and bridegroom were majors, over 15 years of age. Even when the damsel becomes "marriageable", that is, has attained her 15th year, she is recommended in chapter 9, sloka 90, of Manu to wait 3 years before she chooses for herself; even that is only a moral precept as is shown by the next sloka 91 which says that she does not commit any offence if she chooses her bridegroom after she attains her marriageable age. The gloss "of 8 years" in sloka 88 of Manu is that of the ingenious commentator and is not in the text (see also sloka 93 which says that the father's dominion ceases when the damsel is of full marriageable age. In the Privy Council case in *Jumoona Dassya* v. *Bamasoondari Dassya* [3] also it is said that a male youth of the age of 15, of "the full age of adolescence" is regarded as having attained the age of discretion according to Hindu Law and capable of adopting. I do not think that Mr. Justice Mitter in *Rajendra Narain Lahoree* v. *Saroda Sundara Debye* [4] intended to state that even before 15, a male Hindu could adopt, and if he meant it, I respectfully dissent from the opinion. I am also clear that, according to Hindu Law a widow has not got the legal discretion to adopt a proper boy to

1. (1876) I. L. R. 1 C. 108 at 114.
2. (1868) 1 Beng. L. R. 49.
3. (1876) I. L. R. 1 C. 289.
4. (1871) 15 Sutherland, 548.

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her husband before she finishes the 15th year of her age. The *obiter dictum* also in *Ranganayakamma* v. *Alwar Chetty* [1] is that a widow of 13 years was *not* possessed of such discretion. There is nothing in that judgment to indicate that she is capable of exercising such discretion before she completes her 15th year. The Privy Council having held in *Amrito Lal Dutt* v. *Surnomoyee Dasi* [2] that the only person who could make an adoption to her husband is the widow, I am inclined to hold that the *obiter dictum* in *Ranganayakamma* v. *Alwar Chetti* [1] that her discretion could be replaced (when she is less than 15) by her guardian's intelligent and disinterested advice, cannot be supported. Apart from the decision of the Privy Council also, I am clear on the Hindu law that it is only the widow's discretion exercised after she attains majority and is thus capable of legal discretion in civil matters that can validate the adoption made by her to her husband. I am further of opinion that the dictum in *Sri Rajah Venkata Narasimha* v. *Rajah Rangiah* [3](the decision in which as I said before, was reversed by the Privy Council on another point) that an adoption under coercion may be ratified just as a contract under coercion can be ratified is not, with the greatest respect, sustainable as the act of adoption is not an act in the nature of a contract and the validity of an act changing the status of a person cannot be made to remain in suspense at the option of one of the actors in the transaction. The question of coercion and voidability again, does not arise in the present case. It is not alleged that the adoption of Viyyammal was brought about through coercion and hence voidable, but the contention is that she was incompetent to give a valid legal consent to take a boy in adoption and to accept the gift made of a boy in adoption to her husband, having then not attained the legal age of discretion according to the Hindu Law. The analogy applicable (if analogy from the law of contract is at all legitimate) is rather that of a contract made by a major under coercion.

Even assuming for the sake of argument (a) that Viyyammal's guardian's advice, if disinterestedly given, could supply the place of her own consent and discretion, (*b*) that the Hindu Law does not require her to have passed her 15th year before she could make a valid adoption, I must hold, on the finding that she was not asked her consent at all and that her guardian's advice was

1. (1889) I. L. R. 13 M. 214. 2. (1900) I. L. R. 27 C. 996.
3. (1905) I. L. R. 29 M 437.

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not disinterested, that the adoption was wholly invalid and could not be ratified. I am also clear that if her consent was an indispensable requirement under her husband's will, her guardian's advice cannot be substituted for it. Where the widow was directed to adopt a particular boy by her husband and she had no discretion at all in the matter, then it may be that she might have validly adopted that particular boy even though she was less than 15. (See *Mondakini Dasi* v. *Adinath Dey* [1].

Before concluding, I should like to fortify myself with the opinion of two text writers (whom I consider as the best Sanskritists among English-knowing Hindu Lawyers) on the questions of minority and the age of competence to adopt. Jogendra Chunder Ghose says in his book on Hindu Law at page 851 "There is a divergence among Bengal and Benares writers, about the age of majority under the Hindu Law. The former say that it is the beginning and the latter that it is the end of the 16th year. The text of Angira shows that the Bengal writers are right." And then he quotes at page 855 texts of Angira, Manu, Vishnu, Sankha, Likhita, Narada and Brihaspati which, read as a whole, clearly establish that till the end of the 15th year (Una Shodasa) a person is a *bala* and then becomes a major on entering the 16th year. At page 584, the learned author says: "The Privy Council have held that a minor of the age of 15 or 16 can give a valid permission to his wife to adopt. Mr. Mayne has interpreted the judgment of Mr. Justice Mitter on this matter to hold that a boy between the years of 10 and 16 can adopt. But the act of taking in adoption is not only a religious act but a legal transaction (Vyavahara), and one who has not attained the 16th year is incapable of validly entering into such a transaction under the Hindu Law. (See Narada XIII, 32 to 36) ". I shall now quote a few passages on the Hindu Law of adoption, Tagore Law Lectures, 1888, by Golapchandra Sarkar Sastri, M. A. B. L. At page 207 *et seq.* that learned author says: "An important question arises whether there is any limit as to the minimum age under which a person should not be permitted to adopt. The question is beset with considerable difficulty in consequence of there being no express rule of Hindu Law on the matter; and the solution of it must therefore depend upon general principles of law and analogies." "It is worthy of remark here

1. (1891) I.L.R. 18 C 69.

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that as adoption imitates nature, the relative age of the adoptor and the adoptee should be such that the one may be looked upon as the son of the other. Accordingly it was required by Roman law that the adoptor should be older than the person adopted by full puberty, that is, 18 years. The same thing appears to be implied by Saunaka's text which says that the boy adopted should bear the reflection of a son though it has been explained by Nanda Pandita in quite a different way. He says that the boy should be one who is capable of being begotten on his natural mother by the adoptive father. This explanation is, no doubt, given for a different purpose, but it has also an important bearing on this question. Judged by this text an adoption by a minor appears most unreasonable." "The boy adopted is entitled to become an heir not only of the adoptor but also of his relations, and to become his coparcener under the Mitakshara school. Therefore the same reasons that require majority of a man for his competency to bequeath his property by a will, apply with greater force to an adoption; for both are acts requiring judgment and reflection." "The religious duty of adoption attaches to a married man failing to get male issue. And regard being had to the provisions of the Codes, relating to the religious duties in the successive stages of life, there cannot be any doubt that a man cannot contract a marriage during his minority without a breach of religious duties. He is to commence the study of the sacred literature at the 8th year (Manu II, 36) to prosecute his studies for a period at the lowest of 12 or 9 years (Manu III, 1) and after the studentship is over, he is to become a householder by marrying a damsel before her puberty. He may, on the lowest calculation get a son at the age of 20, and failing to get one, may adopt. It follows therefore *that religious considerations can by no means be put forward for supporting an adoption by a minor*". "There is nothing to be found in the Shastras contemplating marriage by a man in his minority. The Hindu law does nowhere provide guardianship of a male for the purpose of his marriage. On the other hand, its provisions on the subject show that a man is to choose his own wife and to maintain and protect her himself. A perusal of the prescribed ceremonial law of marriage cannot leave any doubt on the mind that the bridegroom passing through the rites must be a grown-up man of mature understanding. Manu ordains "A man aged 30 years may marry

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a girl of 12 years; or a man of 24 years a damsel of 8; but if he finishes his studentship earlier, let him marry earlier." Whatever interpretation you may put upon this passage, it shows beyond the shadow of a doubt that the marriage of men during minority cannot be justified on religious grounds. *Far less can an adoption by a minor be supported by religious considerations.* At page 249, in the same work it is said "An act of adoption by a widow, which she is not legally bound to perform, which is not conducive to her spiritual welfare" (as "a widow may attain to heaven by practising religious austerities, though destitute of male issue") but which is highly detrimental to her temporal interests by causing divestment of her estate, must in order to be legally binding on her, be shown to be done by her as a perfectly free agent". "When an adoption by a young widow is set up against her, the court will expect clear evidence that at the time she adopted, she was fully informed of those rights and of the effect of the act of adoption upon them". "Regard being had to the above principles, it appears to be clear that an adoption by an infant widow if *not ab initio* void, is voidable in law." "To hold that an adoption in which an infant widow is caused to take a part mechanically is valid in law, would be legalizing a pious fraud; for it must virtually be the act of those under whose custody the infant widow may be placed, and who abuse the authority they possess over the widow by making her to adopt when she is incapable of understanding the effects of the act on her own rights apprehending that she may refuse to do so, after attaining majority, being influenced more by her personal interests than by the pious duty of adopting a son to her deceased husband. A Bombay Sastri gave his opinion *that a widow while under puberty cannot adopt.* (See Steele's Law and Customs, page 48). The reason for the rule may be that she is incompetent to bring forth a son then, an adoption by a woman being supposed to be analogous to the production of a son". Then the author refers to the absurdity of the idea of a girl having a fictional son when she is naturally incapable of having a real son. Though I have quoted at length these two writers to support my views as against the views in *Ranganayakamma* v. *Alwar Chetty* [1] *Rajendra Narain Lahoree* v. *Saroda Sundaree Debee* [2]

1. (1889) I. L. R. 13 M. 214.

2. (1871) 15 W. R. 548.

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and *Sri Raja Venkata Narasimha* v. *Sri Rajah Rangayya* [1] I think, on the facts found in this case by both the lower Courts, that there is no valid adoption even if the *dicta* found in these cases are accepted in their entirety. I would therefore allow the appeal and restore the decree of the District Munsif with costs here and in the Lower Appellate Court.

Oldfield, J.

Oldfield, J.—I agree with the conclusions reached in my learned brother's judgment, which I have had the advantage of reading. But I prefer to rest my decision on narrower grounds.

Plaintiff sued 2nd to 8th defendants for possession of certain properties, alleging that he held them on lease granted by the guardian of 1st defendant, alleged adopted son of one Subbarayadu. 2nd to 8th defendants who claim under Subbarayadu, now deceased, denied that 1st defendant had been validly adopted. The adoption is said to have been made by Viyyamma, widow of Subbarayadu, in pursuance of a permission to adopt contained in his will. 1st defendant is Viyyamma's brother. The first question is whether 1st defendant had been validly adopted, as he alleges, in 1907 before the plaintiff's lease in 1912.

In 1907 Viyyamma was aged between eleven and twelve and I respectfully adopt my learned brother's reasons for holding that for the purpose of adoption she was still a minor. No clear authority having been shown for the view that with reference to any special period of minority she had attained competency to adopt at the time in question, the decisions in *Mondakini Dasi* v. *Adinath Dey* [2] and *Ranganayakamma* v. *Alwar Chetti*[3] are relevant. No doubt in each a decision as to the circumstances, in which a minor widow could adopt, was unnecessary since in the one the boy to be adopted was specified in the will containing the authority to adopt and in the other the adoption was held to have been procured by coercion. But in the absence of any more recent or direct authority the conclusion based on these two cases must be that "sufficient maturity of understanding to enable the widow to comprehend the nature of her act" is neceesary, and further that, as this court held in the second, there must be "cogent evidence of her having acted under the intelligent and disinterested guidance of her legal guardian seeking *bona fide* to provide for a spiritual necessity with due regard for her interest so far as it is compatible with such necessity". I agree with my learned brother that in

1. (1905) I.L.R. 29 M. 437. 2. (1890) I. L. R. 18 C. 69.
3. (1889) I. L. R. 13 M. 214.

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the present case the Lower Court's findings of fact entail that the adoption in 1907 was invalid.

There is more room for controversy in connection with the remainder of its judgment, in which it remanded the case in order that Viyyamma might be impleaded and a retrial might be held with reference to the possibility of her having validated or being able and willing to validate the adoption with effect from a date prior to plaintiff's lease. This remand will plainly be useless, if no such validation is legally possible. The second question for our decision is therefore as to its possibility. We have had Viyyamma made a party to the appeal, and she has supported the contentions of plaintiff and 1st defendant.

The question is one of some difficulty, regarding which there is very little authority; and the value of that authority is impaired by the fact that in some cases the term "ratification" is used loosely, apparently as equivalent to conduct, which would amount to evidence that a valid adoption had been made, or to an estoppel against the denial of one. Again we clearly have no concern with such interpretations of the term as that by Lord Macnaughten in *Stewart* v. *Kennedy* [1] where its use in a private letter was in question; or with cases of acceptance by one person of the acts of another, as for instance of an agent or guardian. What plaintiff requires is judicial recognition of ratification or some doctrine akin to it, as applicable to the case before us, such a doctrine in fact as is implied in the definition of ratification given by Lord Watson in the case just referred to, to quote the relevant portion of it, "the confirmation of an imperfect obligation by the party, who was not legally bound by it." I refer to a doctrine akin to ratification, because the accuracy of the description of an adoption as an obligation cannot be assumed. It is further material with reference to Indian Law that this definition is applicable to no power ordinarily exercisable by a minor, because a minor can incur no sort of obligation during minority, his contractual acts being void *ab initio*. *Mohori Bibi* v. *Dharmodas Ghose* [2] and *Navakoti Narayana* v. *Logaglinga* [3].

The case of an adoption by a minor widow is *sui generis*. The decisions in *Mondakini Dasi* v. *Adinath Dey* [4] and *Ranganayakamma* v. *Alwar Chetti* [5] already referred to and that in *Amrito Lal Dutt* v. *Surnomoyee Dasi* [6] show that, notwithstanding her

1. (1890) L. R. 15 A. C. 75.
2. I. L. R. 30 C. 539
3. (1909) I. L. R. 33 M. 313.
4. (1890) I. L. R. 18. C 69.
5. (1889) I. L. R. 13 M. 214.
6. (1900) I. L. R. 27 C. 996.

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minority, the legal act can and must be performed by her, not by her guardian on her behalf. This is borne out in the present case by the terms of the authority, under which the widow professed to act, which empowered her, not only to choose the boy to be adopted, but also to decide whether there should be an adoption at all. Does the right of independent action, conceded to the minor in this matter, place her act on the same footing as that of an adult with reference to ratification or any similar doctrine. It seems to me that it cannot do so, where as here, the defect in the original act, which has to be repaired, consists in the failure to obtain the guardian's disinterested advice. For, though the grounds on which such advice was insisted on by this Court in *Ranganayakamma* v. *Alwar Chetti* [1] are not stated, that case to my mind lays down a condition precedent, which must be fulfilled before the act of the minor, a generally incapacitated person, can have any degree of validity, and does not, like the cases dealing with adult *purdanashin* ladies, merely lay down a rule of evidence. If the minor widow's act is *ab initio* totally invalid for want of independent advice, it cannot be validated later by anything of the nature of ratification.

The foregoing assumes that an adult widow can validate an adoption originally imperfect by subsequent conduct. That position also however is in my opinion unsustainable. It is supported by one authority only (*Sri Rajah Venkata Narasimha Appa Row* v. *Sri Rajah Rangayya Appa Row* [2]). It is material that no one's interest was prejudicially affected in that case by the subsequent ratification in consequence of anything which happened before it, and that the lady who made the adoption, was dead, when the litigation began. And accordingly, when the Court had found that during the years, for which she lived after the ceremony, she fully agreed to the adoption and was anxious to establish it, it would naturally strive to uphold it. It did so every shortly on the grounds that Hindu Law did not treat an adoption as void an account of coercion, the objection under consideration, and that under the law of contracts it would be only voidable. This conclusion was reached without reference to the decisions to be cited *infra* and it was not disputed, when the case went on appeal to the Privy Council, the judgment there proceeding on other grounds.

1. (1889) I. L. R. 13 M. 214.

2. (1905) I. L. R. 29 M. 437.

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The decisions in question were given in Bombay; and no doubt they deal directly with the ratification of an imperfect adoption, not by the widow who made it, but by the person, in whom the inheritance had vested and whose consent to an adoption has been held essential to its validity in that Presidency. They do not however turn on any merely local conception of the effect of an adoption, in so far as they are relevant for the present purpose; that is in so far as they deal with the possibility of validation by subsequent acts or conduct. That possibility is no doubt recognised in *Payapa* v. *Appanna*[1] where subsequent ratification by conduct or acquiescence on the part of the person, in whom the estate was vested by inheritance, is referred to, as one condition of the validity of an adoption and as an alternative to his contemporaneous consent. But it must be added with all respect that the reference to ratification was merely *obiter*, since none was relied on in the case before the Court, and that it is hardly reconcileable with the marked insistence on the contemporaneous character of the consent to be required in the portion of the judgment, in which consent is dealt with. It is significant that of the cases relied on by Ranade, J. as authorising ratification, three were evidently cases of estoppel and the fourth, *Rajendro Nath Holdar* v. *Jogendra Nath Banerjee*[2] was decided mainly with reference to the conclusion, based *inter alia* on the conduct of members of the family, that the will containing the authority to adopt was genuine; and is therefore possible that the learned judge referred loosely to ratification as covering estoppels which debarred the party from denying, or conduct, which would establish against him, a consent when the adoption is made. This interpretation of the judgment is supported by the absence of any attempt to reconcile the portion of it relating to ratification with the previous Full Bench decision in *Vasudev* v. *Ramachandra*[3] in which Ranade, J. had concurred, though on grounds of his own. His colleagues held that, in the words of Farran, C. J., "the adoption in question must have been either valid or invalid at the time it took place, and its validity could not depend on the subsequent action of one of the persons, in whom the estate had vested and who was alleged to have consented later". As Fulton, J. observed there was at that date no authority for holding that subsequent

1. (1898) I. L. R. 23 B. 327. 2. (1871) 14 M. I. A. 67.
3. (1896) I. L. R. 22 B. 551.

assent could validate an adoption, which was not valid when made. I am not able in the circumstances already stated to accept the later Madras decision above referred to as conclusive in favour of an application of the doctrine of ratification which appears to me objectionable on its merits. I therefore concur with my learned brother in deciding against it.

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The result is that the appeal is allowed with costs here and in the Lower Appellate Court and the decree of the District Munsif restored.

A. V. V.

PRIVY COUNCIL.

Present:—The Lord Chancellor (Lord Buckmaster), Lord Atkinson, Lord Wrenbury and Mr. Ameer Ali.

[On Appeal from the High Court of Judicature at Fort William.]

Sripat Singh Dugar and another ... *Appellants* *.

v.

Maharaja Sir P. K. Tagore and others ... *Respondents.*

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Sripat Singh Dugar *v.* Maharaja Sir. P. K. Tagore.

Hindu Law—Mitakshara—Execution sale under decree against father—Sale of 'right, title and interest' of judgment-debtor—What passes under such sale.

By the Mitakshara Law a judgment against the father of the family can be executed against the whole of the Mitakshara property in every event but one, *viz.*, that the debt in respect of which the judgment has been obtained was a debt incurred for illegal or immoral purposes.

The presence of the words " right, title and interest " of the judgment-debtor in a sale certificate is consistent with the sale of every interest which the judgment-debtor might have sold, and does not necessarily import when the father is the judgment debtor, that nothing is sold but his interest as a co-sharer. In cases of this kind the substance and not the mere technicalities of the transaction, should be regarded.

Appeal from a decree of the Calcutta High Court, dated February 3, 1911, reversing two decrees of the Subordinate Judge of Burdwan.

Chhatrapat Singh was the father of a joint family governed by Mitakshara Law. Beni Madhab obtained a decree against him and in execution attached the family property. Chhatrapat's sons (the present appellants) sued Beni Madhab for a declaration that their shares were not liable to sale. Pending the suit, the property attached (a Patni taluq) was sold and purchased by the decree holder. A consent order had been passed that the words "right,

* 9th and 10th November 1916.

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title and interest" of the judgment-debtor should be inserted in the proclamation, and the sale certificate contained similar words.

The question for determination on this appeal was as to what passed by the sale. The Subordinate Judge held that only Chhatrapat's undivided share passed, which the High Court (Woodroffe and Carnduff, JJ.) held that what was sold was the whole property over which Chhatrapat had disposing power.

Hence this appeal.

DeGruyther, K.C., for appellants :—The Subordinate Judge was right. Chhatrapat was a co-sharer in a joint family and it was only his interest as such which was attached and sold. The purchaser at such a sale acquires merely the right to compel a partition against the other co-sharers. *Dindayal* v. *Jugdip Narain* [1] *Baboo Hurdey Narain* v. *Rooder Perkash Misser* [2], *Simbunath Pande* v. *Golab Singh* [3].

Sir R. Finlay, K. C. for respondents submitted that it was now too late to take the point that only the interest which Chhatrapat would have obtained on partition was included. Such point was not raised in the pleadings and the Subordinate Judge should not have allowed it to be brought forward when the suit has been framed in another and inconsistent way, and indeed assumes that as a matter of fact the whole property was sold. The appellants' present case is a mere after thought: their first case was that the debt was contracted for immoral purposes.

The whole property passed under the words "right, title and interest." Beyond question Chhatrapat had power to bind the whole property, and both Courts have held that the debt was legal and binding.

In execution proceedings the Court will look at the substance of the transaction, not at mere technicalities. *Rai Babu Mahabir Pershad* v. *Rai Markunda Nath Sahai* [4], *Bisseswar Lall Sahoo* v. *Maharaja Luchmessur Singh* [5].

The words "right, title and interest" were inserted here merely to ensure that the appellants should not be prejudiced by the sale if their suit succeeded on the merits.

Dunne followed.

1. (1877) L. R. 4 I. A. 247; I. L. R. 3 C. 198.
2. (1883) I. L. R. 10 C. 626; L. R. 11 I. A. 26.
3. (1887) I. L. R. 14 C. 572; L. R 14 I A. 77.
4. (1890) L. R. 17 I. A. 11.
5. (1879) L. R. 6 I. A. 233.

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DeGruyther, K. C., replied :—The decree holder contended that the property was governed by the Dayabhaga, while Chhatrapat alleged the Mitakshara applied. The injunction which appellants obtained was dissolved because in any case the father would have a share. The parties were satisfied so long as Chhatrapat's interest only was sold.

Their Lordships' judgment was delivered by

Lord Chancellor.

The Lord Chancellor :—The point to be decided in this case is extremely simple, and it is this : What was the extent of the estate that passed on the sale, under a decree of the Court of the 13th August, 1904, of "the right, title and interest" of a judgment-debtor of a certain property ? There is no doubt whatever that all parties considered that the entire estate had been sold under the order. The price was based upon that hypothesis, and the present appellants were so much impressed with this view that they instituted proceedings for the purpose of obtaining a declaration, that in the special circumstances of the case only one-third was properly liable to attachment. The grounds for that action were these: The property in question was joint property, governed by the Mitakshara law. By that law a judgment against the father of the family cannot be executed against the whole of the Mitakshara property, if the debt in respect of which the judgment has been obtained was a debt incurred for illegal or immoral purposes. In every other event it is open to the execution creditor to sell the whole of the estate in satisfaction of the judgment obtained against the father alone. In the proceedings so instituted the plaintiffs accordingly alleged that the consideration for the debt was illegal and immoral, and on this allegation obtained an *ex parte* injunction restraining the sale of the whole of the estate which was then admittedly the subject of advertisement, and a formal application was subsequently made, asking that the injunction might be continued. Upon the hearing of that application it was urged by the appellants that their case as to the illegality and immorality of the consideration for the debt being still under consideration, the Judge ought to suspend proceedings under the execution decree until that point had been determined, and upon this application the order was made which has given rise to the dispute. The appellants were quite willing that the order should be amended by adding the words "right, title and interest," and to this request the learned Judge acceded. The words so used

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Lord Chancellor.

are undoubtedly ambiguous (*Simbhunath Panday* v. *Golab Singh* [1]) and lend colour to the contention that they only cover the actual third which the judgment-debtor possessed in his own right, and leave unaffected the two-thirds which, though capable of being bound by the order, were not in fact the property of the debtor at all. It therefore becomes necessary to examine the facts and circumstances which led to their introduction. (*Rai Babu Mahabir Pershad* v. *Rai Markunda Nath Sahai* [2]). The learned Judge stated this reason in plain language. He said that the addition of those words would not be calculated to affect the case of either party, and upon that footing they were introduced.

Now there is only one hypothesis upon which the introduction of those words could have left the rights of either party unaffected, and that is, by so construing the order that if the plaintiffs succeeded in establishing that the debt had been incurred for immoral purposes, only one-third would be affected by the decree, while if they failed in that contention, as was ultimately the case, the whole of the estate would remain subject to the order for sale.

That, in their Lordships' opinion, is what the order meant, and had it effected anything else the result would have been that, without any reason at all, the Judge would have deprived the execution creditor of the undoubted right that he possessed, except upon the happening of one event, which, in the result, has never arisen, to sell the entirety of the estate.

Their Lordships are in entire agreement with the view expressed in the case—*Rai Babu Mahabir Pershad* v. *Rai Markunda Nath Sahai* [2]—to which Sir Robert Finlay called their attention, that in cases of this kind it is of the utmost importance that the substance, and not the mere technicalities, of the transaction should be regarded.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs to the respondents, who appeared.

Solicitor for Appellants:—*G. C. Farr.*

Solicitors for Respondents:—*Vallance and Vallance.*

A. P. P.

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1. (1887) L. R. 14 I. A. 77.   2. (1890) L. R. 17 I. A. 11.

PRIVY COUNCIL.

Present:—Lord Parker of Waddington, Lord Sumner, Sir John Edge and Sir Lawrence Jenkins.

[On Appeal from the High Court of Judicature at Madras].

Sulaiman ... *Appellant.**

v.

Biyaththumma and others ... *Respondents.*

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Sulaiman *v.* Biyaththumma.

Marumakkaththayam Law—Mopla, Tarwad—Question of partition—Separate Tarwad or tavazhi—whether a document can be treated as creating rights when not in terms sued on—Code of Civil Procedure, 1908 (*Act* 5 *of* 1908) *S.* 59.

A plaintiff cannot be allowed to put forward as creating rights a document on which he has not in terms sued.

Appeal from a decree of the Madras High Court (Wallis and Sankaran Nair, JJ.) dated August 20, 1909, reversing a decree of the Subordinate Judge of South Canara,

The respondents sued the Appellant and one Mammad alleging that they themselves found one tavazhi (branch) and Mammad another tavazhi of a single undivided Mopla tarwad, of which Mammad was the head: that Mammad was in his dotage and had alienated some of the tarwad properties to his son-in-law, the appellant Sulaiman: they sought to remove Mammad from the headship of the tarwad and to have the alienations declared void. The main defence was that Mammad belonged to a separate tarwad altogether. The plaintiffs in proof of their allegation that the division was into tavazhis only relied strongly on a razinama or compromise petition which was mentioned in but not filed with the plaint, which stated:

" The above family properties were held by the two branches separately. This arrangement was confirmed and the undivided status of the two branches declared by the Razinama (compromise petition) filed in O. S. No. 8 of 1887 on the Sub-Court file. It was therein agreed further that besides the then ratified debts, no other debts should be incurred by the 1st defendant's (*i.e.*, Mammad's) branch.

The Subordinate Judge dismissed the suit. He held that the plaintiffs and Mammad belonged to separate Tarwads and that Mammad was competent to effect the alienations impeached in the plaint. This decision was reversed by the High Court, on the ground that the alienations were contrary to the Razinama,

* 27th November, 1916.

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which represented the plaintiffs and Mammad as forming two tavazhis. "It is quite clear they observed that as between these. Tavazhis, neither could alienate their property, which must be left unalienated to come without loss to the surviving Tavazhi after the disappearance of the other."

On this Appeal

Sir W. Garth for the Appellant;—Upon the evidence the trial Judge was right in holding that the family was separate. The High Court was in error in making a new case for respondents. It was not plaintiffs' case that Mammad was incompetent to make the alienations by virtue of the terms of the compromise of 1887. The plaintiffs relied upon the razinama's evidence of jointness and not for anything more. If it had been suggested at the trial that the Razinama barred Mammad's power of alienation we would have met that case by proper evidence. Further, if the compromise were used for the purpose of affecting rights of property it was inadmissible under S. 17 and 49 of the Registration Act. In any case, on a proper construction of the compromise petition the High Court's view was wrong.

Kenworthy Brown for Respondents :—There was no complete separation between the parties, but merely a division of the family into Tavazhis, which term is used to designate a branch of a Tarwad in separate possession of a portion of the joint family property for convenience of enjoyment. *Kenath Puthan* v. *Narayan* [1]: Mayne's Hindu Law, p. 319.

There was no proof that all the members consented to a complete partition. The High Court's construction of the compromise is correct. It did not require registration. It was a judicial proceeding and S. 17 of the Indian Registration Act does not apply. *Bindesri* v. *Ganga Saran* [2].

Sir W. Garth replied.

The judgment of the Board was delivered by

Sir Lawrence Jenkins.

Sir Lawrence Jenkins ;—The plaintiffs and Mammad, the first defendant, who has died since the institution of this suit, were descendants from a common stock. It is the plaintiffs' case that they were members of an undivided Mopla Tarwad governed by Marumakkaththayam law, and that this Tarwad possessed considerable properties, including those in the suit. Mammad, it is alleged, was the senior and Karnavan of the whole Tarwad;

1. (1904) I L.R. 28 M. 182, 189 (F. B.) 2. (1897) L. R. 25 I. A. 9.

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and it is charged that he dealt with Tarwad property in fraud of the plaintiffs, and improperly alienated portions of it to Sulaiman the second defendant.

The plaintiffs accordingly pray by their plaint that the first defendant be deposed from the management of the plaint properties, or in the alternative that the plaintiffs' right thereto be declared free of any encumbrance made by the first defendant. They further seek a declaration that the alienations in favour of the second defendant specified in the plaint are invalid and not binding against the plaintiffs.

By way of defence it is denied that the plaintiffs and first defendant were members of an undivided Mopla Tarwad, or that the first defendant was the senior and Karnavan of the whole Tarwad. On the contrary, the allegation in the written statement is that the branch of the plaintiffs and of the first defendant with seven others, became divided as far back as 1837—38, and that each branch has been livingseparately and enjoying and dealing with the properties separately and independently of the other branches. The suit was heard in the Court of the Subordinate Judge of South Canara, and was dismissed on the 14th September, 1904.

On appeal this decree was reversed by the High Court of Madras on the 20th August, 1909, and it was declared that the alienations made by the first defendant in favour of the second defendant of certain specified properties were invalid and not binding against the plaintiffs. From this decree of the High Court the present appeal to His Majesty in Council has been preferred.

Though by the law which governs a Mopla Tarwad there cannot be a partition unless all the members consent, yet it is common ground that there has been a partition of the properties of the original Tarwad in this case. The point in dispute is as to the character and extent of this partition.

To understand the rival contentions regard must be had to the history and state of the family, and this is compendiously shown in the tabular statement appended to the plaint. Descent under the law by which this family is governed is always traced through the female line to a female ancestor. It will thus be seen that the three stocks to which descent is traced were three sisters who left descendants—Bavumma, Kunhi Kathiya, and Thaki. There were two other sisters, but they can be left out of consideration

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as they apparently left no issue. Bavumma left four descendants, and Thaki two; of Kunhi Kathiya's descendants only three left issue. It is with the line of Kunhi Kathiya alone that this litigation is concerned.

The plaintiffs' contention is that the partition which was effected was only between the three branches of Bavumma, Kunhi Kathiya, and Thaki, and that the allotment made to the nine branches tracing from the several descendants was not by way of complete partition, but was merely a division for convenience of enjoyment.

The case made by the defence is that there was a complete partition between the nine branches, and that thereby nine separate and independent shares were constituted.

The last view was affirmed by the Subordinate Judge and no dissent from it is expressed by the High Court; on the contrary, such inference as is suggested by that Court's meagre and inconclusive judgment is that it accepted the finding of the Subordinate Judge on this point, for the course followed by the High Court seems to assume partition into nine shares. In these circumstances, it might be enough for their Lordships to say that they are not satisfied that the Subordinate Judge was wrong in his view of the status of the family; but as the evidence has been examined and discussed before them in considerable detail, they think it right to indicate briefly the reasons that have led them to the same conclusion as that of the Subordinate Judge.

In 1856 a suit was commenced by Kunhi Paththuma, a descendant of Kuttyacha, against Moidin and Hasnar, the nephew of Kunhammad, who respectively represented the lines of Pathi and Biathu. In other words, it was a suit between the representatives of the three lines descended from the common ancestress, Kunhi Kathiya, one of the three sisters already mentioned. The suit is described as one to establish the plaintiffs' right in property "after the first defendant." It ended in a compromise in the terms set forth in a Razi Petition, Exhibit XLII, in this suit.

It runs as follows:—

"All the properties belonging to the plaintiff and defendants on the hereditary right and acquired from the time of Recha Baithan up to the time of Amanath were divided into nine shares, with the consent of all members of the family, in the presence of respectable men, in 1013 (1837—38), and two of

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those nine shares were allotted to Baithan and his nephew Sanna Baithan, the descendants of Thaki (female); four others were allotted to Bavumma's descendants, *viz.*, one to Kalandu, one to Assan, one to Moidin Kutti, and one to Alimasa; and three shares to the descendants of Kunhi Kiriya (Kadya), *viz*, one to the first defendant, one to the plaintiff's uncle Kunhi Hassan, and one to second defendant's uncle Kuttiamad—thus they were separately enjoying the nine shares and paying the assessment.".

The importance of this statement can hardly be exaggerated; it confutes the plaintiffs' suggestion of a division into three Tarwads, followed by a subsequent incomplete sub-division into nine branches, merely for convenience of enjoyment; and it supports the defence contention that the division was not into three but into nine independent shares, and that the separation was complete.

It is true that for the purpose of arriving at the proper mode of division there is a reference to the three stocks of descent, Bavumma, Kunhi Kathiya, and Thaki, but this was so of necessity, and was merely an application of the rule that division for the purpose of partition is stirpital, though, as between the members of any one class, it is capital. Nor is the actual compromise effected without its significance. Moidin, it appears, was old and had no family members; he had executed a will in favour of the second defendant, and this will was set aside with the consent of the second defendant. He had also made gifts of certain properties to his children, who were not members of the family. By the compromise it is provided that, "excepting these, the remaining properties have been equally divided with details thereof by the first defendant between the second defendant and the plaintiff's son Sooppi, so that they may enjoy the same from generation to generation according to Aliyasanthana law, and as he has delivered possession of those properties to them, these two persons may enjoy those properties as owners, paying the assessment separately which first defendant has been paying." This arrangement manifestly proceeds on the basis of a complete division in interest. But the matter does not rest there: the history of the family and the conduct of the parties, with an exception, to which reference will later be made, was in accordance with such a division. There was separate residence, separate assessment, and separate management. The revenue

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proceedings, the statements in the Vakalaths, the alienations of property are all suggestive of separation, and this is the view that has been taken in earlier litigation in which this issue has been involved.

No doubt the litigation of 1886 and 1887 in some measure helps the plaintiffs' contention, for those suits were brought on the allegation that the plaintiffs and the first defendant were members of an undivided family, and Kunhammad and Mammad were among the plaintiffs in one of these suits and Mammad in the other. But the allegation was challenged and no judicial pronouncement was made in its favour, for each suit ended in a dismissal and a compromise. The terms of the compromise are to be found in Exhibit LL. The plaintiffs place much reliance on this document, and the High Court's decision in their favour is apparently based on its provisions.

It has been urged that on its true construction Exhibit LL shows that the only complete separation was into three shares and not into nine, and especial stress has been laid on the opening clause. But the document must be read as a whole, and so read its true meaning does not support the plaintiffs' view; in fact, the final provision appears to their Lordships to be conclusive to the contrary. Much has been made of the use of the word Tavazhi, and what is claimed to be its primary signification; but even the authority on which this claim is made shows that it is a word of equivocal meaning, and may fairly be used where the separation is complete. While, therefore, their Lordships recognise that the attitude of Kunhammad and Mammad in this litigation of 1886 and 1887 is worthy of consideration, it would be easy to attribute too much weight to it, and this they feel would be done if they allowed it to outweigh the clear statement in the compromise made in the suit of 1856, and the indirect evidence which from all sides converges to the conclusion that there was complete separation.

In fact, it may be fairly said that there are disclosed in the evidence all those incidents that would be present in the case of separation, and even after the compromise of 1887 there are dealings and conduct on the part of the plaintiffs which, in strictness, would only be consistent with the existence of two separate Tarwads in the sense for which the defence contends. In the light of these several matters, their Lordships see no reason to think that the Subordinate Judge erred when he elected to

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be guided by the documentary evidence rather than by the oral testimony of the witnesses.

It only now remains to deal briefly with the use to which Exhibit LL. was put by the High Court. The judgment apparently treats the document not merely as evidence, but as creating rights. The view of its operation taken by the learned Judges was that the income of the properties in the possession of each branch was to be enjoyed by the members of that alone till the extinction of that branch; but that they had no right of alienation.

The objection to this, however, is that the plaintiffs did not sue on this document. They did not produce it in Court when the plaint was presented, nor did they deliver it or a copy thereof to be filed with the plaint, and yet this is what the Code of Civil Procedure, S. 59, directs as regards a document on which a plaintiff sues. Nor was the document treated otherwise than as a piece of evidence in the trial Court. And this is important, for had it been put forward by the plaintiff as creating rights then, apart from any difficulty as to its admissibility in the absence of registration—a point on which their Lordships express no opinion—it is manifest that a line of defence requiring evidence might have been adopted, which was unnecessary so long as the Razi petition was used merely as a piece of evidence.

Their Lordships therefore decline to deal with the Razi petition as a document which created a bar on Mammad's power of alienation, and they do this the more readily as it does not appear to them to bear the construction, or have the effect ascribed to it by the High Court.

The result, then, is that their Lordships hold that the suit was rightly dismissed by the Subordinate Judge, and they will therefore humbly advise His Majesty that the appeal ought to be allowed, the decree of the High Court set aside, and that of the Subordinate Judge restored with costs in both Courts, and that any costs paid under the decree of the High Court must be returned. The respondents must pay the costs of this appeal.

Solicitor for Appellant:—*Douglas Grant.*

Solicitor for Respondents:—*E. Dalgado.*

A. P. P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Seshagiri Iyer and Mr. Justice Phillips.

Attyam Venkatasubbarayadu and another. *Petitioners* in C.M.P. No. 1234 of '13. (Respondents in L.P.A. No. 26 of 1912 on the file of the High Court.)*

Bachoti Bhavan Narayana Sastri. *Petitioner in C. M. P. No. 1633 of 1913 (2nd Respondent in L.P.A. No. 28 of 1912 on the file of the High Court.)*

v.

Sri Rajah Velugoti Govinda Krishna Yachendrulu Varu Bahadur Zemindar Garu. *Respondent in both (Appellant in L. P. A. and the C. M. P. Nos. 26 and 28 of 1912 on the file of the High Court.)*

Attyam Venkatasubbarayadu v. Sri Rajah Velugoti Govinda Krishna Yachendrulu.

High Court—Appeal under Cl. 15 of the Letters Patent—Power to review—Practice of the Court.

The High Court has power to entertain a review in appeals preferred under Cl. 15 of the Letters Patent.

Hafiz Muhammed Moshin v. *Sheo Prasad* [1] referred to.

Ravi Veeraraghavalu v *Venkatanarasimha Naidu Bahadur* [2] referred to.

In a matter like this, the practice of the Court should not be lightly departed from, though not warranted by a strict construction of the law.

Petitions praying that in the circumstances stated therein the High Court will be leased to review the Judgments of the Honourable Mr. Justice Benson and the Honourable Mr. Justice Sundara Aiyar in L.P.A. Nos. 26 and 28 of 1912 preferred against the order of the Honourable Mr. Justice Abdur Rahim in S. A. Nos. 1107 and 1109 of 1911 respectively preferred against the decrees of the Court of the Subordinate Judge of Kistna at Ellore in A.S. Nos. 218 and 220 of 1910 (O.S. Nos. 432 and 430 of 1908 on the file of the Court of the District Munsif of Ellore) respectively.

T. R. Ramachandra Aiyar and *P. Narayanamurthy* for Petitioners.

S. Subramania Aiyar for Respondent.

The Court delivered the following

Judgment :—Mr. Subramania Aiyar has taken the preliminary objection that the High Court cannot entertain a review in appeals preferred under S. 15 of the Letters Patent. The question

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* C. M. P. Nos. 1234 and 1633 of 1913. 21st December 1915.

1 (1904) 1 A.L.J. 509. 2. (1913) I.L.R. 37 M. 443 : 27 M.L.J. 451.

Attyam Venkata-subbarayadu v. Sri Rajah Velugoti Govinda Krishna Yachendrulu.

is practically *res integra* as the decision in *Hafiz Muhammed Moshin* v. *Sheo Prasad* [1] in which the point was directly raised gives no reason for the conclusion arrived at.

After hearing the matter fully argued by the learned Vakils on either side, we are of opinion that there is no force in the objection : S. 44 of the Letters Patent says that the provisions are subject to the Legislative powers of the Governor-General in Council. As at present advised we are in agreement with Mr. Subramania Aiyar that this provision would not enable courts, by implication, to supplement the Letters Patent by importing into them all acts, *ejusdem generis*, passed by the Governor-General in Council and that the provision is only intended to empower the Governor-General in Council to legislate with a view to supplement omissions in the Letters Patent. Even in this view, we think that by S. 117 of the Code of Civil Procedure (Act V of 1908) the Governor-General in Council did incorporate into the Letters Patent the provisions relating to review. It was then argued that the review Section 114 of the Code (Act V of 1908) cannot apply as it provides only for the review of decrees or orders passed under the Code of Civil Procedure. We are not impressed by this argument. In the first place, decrees are passed in appeals heard under the Letters Patent only under the Code of Civil Procedure. In the second place Clause (B) of S. 114 does not require that orders and decrees should have been passed under the Code. Further the word decree or order includes a Judgment. *Krishnan Dayal* v. *Irshad Ali* [2]. Mr. Subramania Aiyar relies on *Sabapathi Chetty* v. *Narayanaswamy Chetty* [3] for the proposition that S. 15 of the Letters Patent is not controlled by the Code of Civil Procedure. All that was decided in that case was that as S. 15 had given an unlimited power of appeal against every Judgment of a single Judge, the Governor-General in Council should not be understood to have taken away by implication that power of the litigant by making S. 540 of the Code (Act XIV of 1882) applicable to chartered High Courts. This does not contravene the principle that it is competent to the Governor-General in Council to supplement the remedy of appeal by giving an additional remedy by way of review to the litigant.

1. (1904) 1 A. L. J. 509.
2. (1915) 22 C. L. J. 525.
3. (1901) I.L.R. 25 M. 555 : 11 M L. J. 346.

Attyam Venkatasubbarayadu v. Sri Rajah Velugoti Govinda Krishna Yachendrulu.

The decisions in *Babaji Bin Patloji* v. *Babaji Bin Mahadu* [1] *Lala Prayag Lal* v. *Jai Narain Singh* [2] and *Nana Bin Aba* v. *Sheku Bin Andu* [3] only lay down that a self-contained-act should not be added to by the provisions of the Code of Civil Procedure. This does not affect the present question.

Mr. Ramachandra Aiyar has referred us to two reported cases and to an unreported decision in which reviews under similar circumstances were entertained. Apparently the practice of this High Court has been in favour of allowing reviews to be filed in appeals under the Letters Patent.

It was pointed out by the Judicial Committee in *Ravi Veeraragavelu* v. *Venkatanarasimha Naidu Bahadur* [4] that even though a strict construction of the law may not permit of the entertainment of appeals, a long standing practice of the court should not be lightly departed from in that respect. What relates to appeals applies *mutatis mutandis* to reviews also. We must therefore overrule the preliminary objection.

If we are to interfere in review in these cases, it can only be by upsetting conclusions of fact at which the learned Judges who heard the appeal arrived. We are not prepared to adopt this procedure.

The petitions are dismissed with costs.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Abdur Rahim, Officiating Chief Justice and Mr. Justice Burn.

Soorthingjee Sakalchand — *Appellant** *(Plaintiff).*

v.

Mahomed Nasurudeen and another. — *Respondents (Defendants).*

Soorthingjee Sakalchand v. Mahomed Nasurudeen.

Sale of goods—Contract with Austrian Firm through its agent—C. I. F. Contract—Payment against tender of shipping documents—Out-break of war—Effect of—Royal Proclamations—Contract becoming impossible of further performance—Contract Act, S. 56—Suit against a person in his capacity as agent—Personal liability, none.

In May 1914, plaintiff entered into a contract with the defendant the Madras agent of an Austrian Firm, for the purchase of glass bangles from the firm. Payment was to be made in Madras on arrival of the goods, in exchange for shipping documents made out to the order of the shippers. Plaintiff accepted two drafts for the price of goods on 22-7-1914. England declared war with Austria on 12-8-1914, and the goods arrived in Ceylon on 15-8-1914 in an enemy vessel. Two Royal

* O. S. A. No. 26 of 1916. 18th October 1916.

1. (1891) I. L. R. 15 B. 660.
2. (1895) I. L. R. 22 C. 419.
3. (1908) I. L. R. 32 B. 337.
4. (1914) I. L. R. 37 M. 443 : 27 M. L. J. 451, (P. C.)

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Proclamations were issued on 5-8-1914 and 12-9-1914, making it unlawful, among other things, "to act on behalf of an enemy in drawing, accepting.........or otherwise dealing with a negotiable instrument or to accept, pay, or otherwise deal with a negotiable instrument held by or on behalf of the enemy." The goods after their arrival were seized by the Government, but were formally released on 26-8-1915. The Bills of Lading were in the possession of the National Bank, Madras, who were to act as agents of the Austrian Firm for the collection of the drafts and for the purpose of making over the documents relating to the goods The Bills were payable on 22-8-1914. In a suit by the plaintiff in 1915 for recovery of the goods from the defendant as agent of the Austrian Firm, *Held*; dismissing the suit, that the contract between the parties was a C. I. F. Contract under which the buyer was entitled to the documents of title only on payment of the money due under those documents and until then he had no right to the goods; that the agency of the National Bank for the purpose of delivering the documents or receiving the money due thereon must be taken to have been terminated by the declaration of war; and that the mere fact that the goods had arrived and were now in British India could make no difference in this respect as the further performance of the contract became impossible or unlawful within the meaning of S. 56 of the Contract Act.

Arnhold Karberg & Co. v. *Blythe, Green, Jourdain & Co.* [1], Referred to.

Even if the effect of the declaration of war was merely to suspend the contract as regards the right to performance and right of action, the suit was still liable to be dismissed, having been brought during the continuance of the war. *Esposito* v. *Bowden* [2], *G. C. Sett* v. *Madhoram Hurdeodass* [3], Referred to.

The suit having been brought against the defendant in his capacity as agent of the Austrian Firm, the Court would not, on appeal, give the plaintiff leave to amend the plaint so as to make the defendant personally liable.

On appeal from the judgment of the Honourable Mr. Justice Bakewell dated the 14th March 1916 passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 396 of 1915.

D. Chamier and *M. D. Deva Doss instructed by Messrs. Short* and *Bewes & Co. Attorneys* for Appellant.

V. V. Srinivasa Ayengar, C. P. Ramaswami Aiyar and *A. Duraiswami Aiyar* for Respondents.

The Court delivered the following

Judgment:—This is an appeal from the judgment of Mr. Justice Bakewell dismissing the plaintiff's suit which was instituted with the object of recovering certain quantity of glass bangles from the defendants. The 1st defendant was an agent of an Austrian Firm and in his capacity as such agent entered into a contract with the plaintiff for the supply of glass bangles. The contract was entered into some time in April and May 1914 and the plaintiff accepted two drafts for the price of the goods on 22nd July of that year. War was declared with Austria on the

1. (1915) 2 K. B. 879.
2. (1857) 7 El. & Bl. 763.
3. (1916) 33 I. C. 540.

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12th August and the steamer "Steinturm" in which the goods were shipped arrived in Ceylon on the 15th of August that is three days after the declaration of the war. It is sufficiently clear that the cargo which was at first detained by the Government was subsequently released and the formal order of release so far as these goods were concerned was passed on the 26th August 1916. The Bills of Lading were in the possession of the National Bank of India in Madras who acted as agents for the collection of the drafts and for the purpose of making over the documents relating to these goods as agents of the Austrian Firm. The Bills were payable on the 22nd of August; the goods have not yet been delivered to the plaintiff and the drafts have not been paid.

Mr. Justice Bakewell has held that since the contract became wholly void on account of the outbreak of the war with Austria and as by virtue of Royal Proclamation issued on the 5th of August 1914 and 12th September 1914 it became unlawful to trade with the enemy, the suit of the plaintiff for recovery of the goods could not be maintained. Section 56 of the Contract Act seems to me to be perfectly clear on the point. It declares that "a contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."

It is argued by Mr. Chamier on behalf of the appellant that we must treat this case as one of executed contract because the Austrian Firm, he says, have done their part of the contract and all that remains is for the plaintiff to perform his part which he has been ready and willing to do. But that is not the correct position. The Austrian Firm has yet to deliver the documents, which, as pointed out in a number of decisions are the symbol for the goods, and the plaintiff has to pay the purchase money to the enemy firm. The agency of the National Bank must be taken to have been terminated by the declaration of the war. They are no longer the agents of the Austrian Firm for the purpose either of delivering the documents or of receiving the money due upon those documents. The mere fact that the goods have arrived and are now within the limits of British India can make no difference in this respect as the further performance of the contract has now become impossible or unlawful. The proclamation of the 12th of September says; "(2) Not to compromise or give security for the payment of any

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debt or other sum of money with or for the benefit of an enemy. (3) Not to act on behalf of an enemy in drawing, accepting presenting for acceptance or payment, negotiating or otherwise dealing with any negotiable instrument. (4) Not to accept, pay or otherwise deal with any negotiable instrument which is held by, or on behalf of the enemy."

The result of that Proclamation is clearly to make it unlawful on the part of the plaintiff to pay any money to the Austrian Firm or to receive any goods from them in return for such payment. This is the effect of the decision in *Arnhold Karberg & Co.* v. *Blythe Green, Jourdain & Co.* [1]. But it is argued by Mr. Chamier that the property in the goods had passed to the plaintiff before the declaration of the war, and this he seeks to make out on the facts that the samples were shown to the plaintiff at the time he accepted the draft and the goods had been shipped before war was declared. We do not think that this is a correct contention. The contract is what is known in commercial circles as a C. I. F. contract the effect of which as held in a number of decisions of the English Courts and very fully discussed in the case which has been mentioned, is that the buyer under such a contract is entitled to the documents of title on payment of the money due on those documents. Until then it cannot be said that he has any right to the goods. It is stated by Justice Scrutton in the same case at page 387 of the report, "I understand the effect of those judgments to be that where the seller by taking the bills of lading in his own name or to his own order has reserved the *jus disponendi* or power of dealing with the goods, the property does not pass on shipment, but is vested in the vendor until he receives payment from the buyer in exchange for the documents of title."

The documents in this case are made out to the order of the shippers and therefore it cannot be said that the plaintiff acquired any right to the goods before he obtained the documents of title in exchange for payment.

It was strenuously argued by Mr. Chamier that this decision is based on the Sale of Goods Act in England and that the Indian Contract Act lays down the law differently, and he referred us to Ss. 78 and 83. The last clause of S. 78 says, "If the parties agree, expressly or by implication that the payment, or

1. (1915) 2 K. B. 379.

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delivery, or both, shall be postponed, the property passes as soon as the proposal for sale is accepted." But then this is subject to any special contract which the parties may enter into and if the effect of a C. I. F. contract, be it as it is laid down in the English cases, that cannot be said to be over-ridden by anything in S 78. The parties to a contract like this must be taken to have accepted the ordinary incidents which are attached to such contracts by mercantile usage. S. 83 does not seem to us to touch the point at all. It only says that the goods which are not ascertained at the time of making the agreement for sale may be appropriated afterwards by the consent of the parties. Of the two Indian decisions which have been referred to in the course of the argument, one is a decision of Mr. Justice Chowdhry of the Calcutta High Court in *G. C. Sett* v. *Madhoram Hurdeodass* [1]. Reliance was placed by the appellants on a statement at page 544:—"Such contracts even with an alien enemy are merely suspended during the war as regards the right to performance and right of action, and are avoided or dissolved only in certain circumstances, among them, if its performance necessitates intercourse with the enemy during the war."

This is laid down on the authority of *Esposito* v. *Bowden* [2]. Now even if that *dictum* was applicable to the case under our consideration it does not appear how it would help the plaintiff in any way. The suit will still be liable to be dismissed as it could not be maintained during the continuance of the war. The decision of the Bombay High Court reported in 18 Bombay Law Reporter 531 was also referred to. But that was a suit on a bill of exchange, the parties to which were both British subjects. That is sufficient to distinguish that case from the present. I may here mention that Mr. Chamier contended that in this case not only was the Austrian Firm liable on the contract but also the first defendant in his personal capacity and he asked us to permit him to amend the plaint so that he might obtain relief against the first defendant apart from his capacity as agent of the Austrian Firm. But this is inconsistent with the case sought to be made out in the plaint. The suit was brought against the 1st defendant as agent of the Austrian Firm and this is made clear in para. 3 of the plaint. Mr. Chamier also put forward another argument that since the Government had released the goods, that

1. (1916) 33 I.C. 540. 2. (1857) 7 El. & Bl. 763 ; 119 E.R. 143.

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will have the effect of reviving the contract or renewing the validity of the contract although it had become void before the order of release was passed. That cannot be taken to be the effect of the order of release. Its only effect is that the Government withdraws its hands so that any party entitled to the goods may establish his right to them. Mr. Chamier in the course of his argument, asked us what will become of the goods: to whom will they go? It is not necessary in this suit to answer that question. The plaintiff's contract became void by reason of the outbreak of the war and he cannot recover the goods on the basis of such contract.

The appeal is dismissed with costs. There will be one set of costs. The costs of the interlocutory application will be included in the costs of this appeal.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Abdur Rahim, Officiating Chief Justice, Mr. Justice Ayling and Mr. Justice Seshagiri Aiyar.

Mrs. Annie Besant ... *Petitioner** (*Respondent*).

Annie Besant In re.

Press Act (I of 1910) Ss. 3 (1) proviso, and 22—Scope of—Security dispensed with at the time of declaration—Subsequent imposition of security, if valid—Magistrate acting under S. 3 (1) of the Press Act, if a judicial body—Writ of certiorari. *—Powers of High Court—S. 22 of the Press Act, effect of.*

Where at the time of making a declaration under S. 4 of Act 25 of 1867, the Chief Presidency Magistrate acting under sub-section 1, S. 3 of the Press Act, dispensed with the deposit of security by the keeper of a printing press and subsequently cancelled his order dispensing with security and directed the keeper of the press to deposit the maximum security,

Held, that the order of the Magistrate imposing security was not a judicial act and therefore not open to revision by the High Court either by means of a writ of *certiorari* or under its ordinary revisional powers.

Held, per Abdur Rahim, O. C. J. and Seshagiri Aiyar, J. (Ayling, J. dissenting) that the order of the Magistrate imposing security was *ultra vires*, and that S. 22 of the Press Act, by itself, had not the effect of taking away the power of the High Court to issue a writ of *certiorari*.

Petition, under Ss. 106 and 107 of the Government of India Act, 5 and 6 George V. Ch. 61 and S. 435 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Chief Presidency Magistrate, Egmore, Madras, dated the 22nd May 1916, calling on the Petitioner to deposit security for Rs. 2,000 under S. 3 (1) of Act I of 1910.

Facts:—On 14-7-1914, Mrs. Annie Besant, Editor of "New India" and keeper of the "New India Printing Works"

* Cr. R. C. No. 661 of 1916 and Cr. R. P. No. 542 of 1916. 18th October, 1916.

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purchased the printing press as well as the good-will of a newspaper styled "The Madras Standard" which she continued to publish under the name of "New India." On 2-12-1914, Mrs. Annie Besant made the usual declaration under S. 4 of Act XXV of 1867, but the deposit of security was dispensed with, under the proviso to Sub-S. (1) of S. 3 of the Press Act. On 22-5-1916, the Chief Presidency Magistrate, Madras, informed Mrs. Besant as follows: "I hereby cancel my order dated 2-12-1914 dispensing with security in respect of the 'New India Printing Works'' and require you under S. 3 (1) of Act I of 1910 to deposit security for Rs. 2000." Mrs. Besant thereupon deposited the required security which was forfeited on 28-8-1916 by the Government under S. 4 (1) of the Press Act. Against the order of the Magistrate requiring the deposit of security, Mrs. Besant filed a revision petition to the High Court.

C. P. Ramaswami Iyer for Petitioner.

The Hon. Ag. Advocate General (*S. Srinivasa Iyengar*) and *The Public Prosecutor* instructed by the *Government Solicitor* for the Government.

The Court made the following

The Offg. Chief Justice.

Order:—*The Officiating Chief Justice*:—This petition is under Ss. 106 and 107 of the Government of India Act, 5 and 6 George V. C. 61 and S. 435 of the Code of Criminal Procedure asking us to revise the order of the Chief Presidency Magistrate requiring deposit of security from the petitioner. I have already dealt with the contention of Mrs. Annie Besant in the petition under S. 17 of the Press Act* and held that the order was made in excess of the power conferred on the Magistrate but that there was no provision in the Press Act itself which would enable us to revise the order.

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* [The following paragraphs dealing with the question are extracted from the judgment of the Officiating Chief Justice in O. P. No. 122 of 1916.]

1. "The Chief Presidency Magistrate, however, chose to dispense with the deposit of security at the time the applicant made the declaration. And it is thereupon argued that he became *functus officio* so far as this press was concerned and was not competent to pass his subsequent order of 22nd May 1916. By S. 3 (1), all keepers of printing presses are required to deposit security at the time of making the required declaration to such an amount not exceeding Rs. 2,000 as the Magistrate may fix: then comes the proviso which says "Provided that the Magistrate may, if he

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Under S. 106 of the Government of India Act which continues in this High Court all the powers and authority already vested in it we are asked to quash the proceedings of the Magistrate by means of a writ of *certiorari*. The old Supreme Court of Madras which is now absorbed in the High Court had all the jurisdiction and authority of the Court of the King's Bench in England which included the power to issue writs of *certiorari*. (See 39 and 40 George III Chapter 79 and the Letters Patent of 1800). That power has been preserved to the Madras High Court by the High Courts (Charter) Act 1861, the Charter Act of 1865, Letters Patent, Madras 1865 and lastly the Government of India Act 1915. It is not shown that this jurisdiction has been taken away by any act of the legislature which could only be done by express words or by necessary implication.

I find nothing in S. 22 of the Press Act which can be said o have deprived the High Court of this power. S. 22 says "every declaration of forfeiture purporting to be made under this Act shall as against all persons be conclusive evidence that the forfeiture therein referred to has taken place, and no proceeding purporting to be taken under this Act shall be called in question by any Court except the High Court on such application as aforesaid.:...." The first part I have no doubt does not refer to the validity of an order of forfeiture but to the fact that it has been made. And I do not see how it is possible to read the words "and

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thinks fit for special reasons to be recorded by him, dispense with the deposit of any security or may from time to time cancel or vary any order under this sub-section." It is contended by the learned Advocate-General on behalf of the Crown that the words "to cancel or vary any order under this sub-section" gives the Magistrate the power to cancel his order dispensing with security although he derived authority to pass that order from the proviso itself. But it seems to me that the use of the words 'or may' before the words "cancel or vary any order under this sub-section" goes to negative such a construction: it indicates that an order dispensing with the deposit of security is not included in the words "any order within this sub-section."

2. "It is true in one sense that a proviso is part of the Section to which it is attached. But in ordinary legal parlance a proviso is to be distinguished from the enactment to which it is generally appended either for the purpose of explaining what particular

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no proceeding purporting to be taken under this Act" as including any order of the Magistrate under S. 3 (1), otherwise the passage would run thus "and no proceeding purporting to be taken under this Act including an order of the Magistrate under S. 3 (1) shall be called in question by any Court except the High Court on such application as aforesaid." This would make no meaning. The application referred to there is an application under S. 17, that is to set aside an order of forfeiture and that clearly shows that the proceeding in contemplation of the legislature is a proceeding under S. 4 and under similar sections of the Act and not a proceeding under S. 3 which has nothing to do with forfeitures at all. This may be an omission on the part of the Legislature but we have to give effect to the Act as we find it.

There can be no doubt whatever that this High Court has jurisdiction to issue writs of *certiorari* in order to remove the proceedings of courts or of persons entrusted with Judicial functions out of ordinary course of legal procedure for the purpose of quashing them. It was stated at the bar that no instance of the issue of such writs by this court is to be found on record. But that would not extinguish the jurisdiction. It is true as pointed out by the Advocate-General that many of the powers which the King's Bench exercises in England by means of writ of *certiorari* have been expressly conferred upon the High Courts in India by different legislative enactments such as S. 15 of the Letters Patent, S. 115 of the Civil Procedure Code, S. 25 of the Provincial Small Cause Courts Act and S. 435 of the Criminal Procedure Code, etc.

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matters are not within the meaning of the enactment (see *West Derby Union* v. *Metropolitan Life Assurance Society*, [1]) or for providing exceptions and qualifications to the enactment or for other similar purposes. The proviso is something subordinate to the main clause and the general rule is that what is contained in the proviso is not to be imported by implication into the clause."

3. "When a reference is made in the proviso to what is enacted by the Section or sub-section to which it is appended, one would not ordinarily read it, unless so compelled, to include anything contained in the proviso itself. Here the main purpose of the enactment is to authorize the Magistrate to fix the amount of security and it is to enable him to cancel or vary this order from

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1. (1897) A. C. 647 at p. 652.

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But these powers of revision and control are available only over the proceedings of ordinary Courts ; while a writ of *certiorari* is issued not only to Courts but to tribunals specially constituted and entrusted with duties of a judicial character. For instance in England the proceedings of Censors of the Royal College of Physicians, of the Commissioners of Sewers, of Canal Commissioners, of Sheriffs and of Licensing Justices have been held to be subject to the writ. Writs of *certiorari* have also been issued by the Calcutta and Bombay High Courts. In *Nundo Lal Bose* v. *The Corporation for the Town of Calcutta* [1] an assessment made by the Commissioners of the town of Calcutta was removed to the High Court by a writ of *certiorari* and quashed by Chief Justice Garth and Justice Wilson. The learned Judges in that case do not appear to have entertained any doubt whatever that they had jurisdiction to issue the writ. The first and essential question on this application is whether the taking of security by the Magistrate under S. 3 (1) of the Press Act was a ministerial or Judicial Act. If the former, it is conceded that we cannot interfere even by a writ of *certiorari* much less under S. 435, Criminal Procedure Code or under the power of superintendence which we possess over the inferior Courts under S. 107 of the Government of India Act.

That the writ lies only with respect to judicial acts is well established (see Halsbury's Laws of England, Vol. 10, para. 338). Whether an act is judicial or not depends on the nature of the powers conferred by the legislature, the character of the act

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time to time that he is given the power under the latter part of the proviso."

4. "It was argued that the legislature could not have intended that if the Magistrate once dispensed with the deposit of security, he should have no further power to require security if he so chose. But it must be remembered that he is to dispense with security only for special reasons which have to be recorded by him and it is not unlikely that the legislature thought that where such reasons existed, the particular keeper of the press who was so exempted should not again be called upon to furnish security."

5. "However that may be, I do not feel called upon to put any construction on an enactment such as this which would tend to extend its scope beyond what is warranted by the natural meaning

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1. (1885) I. L. R. 11 C. 275.

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sought to be quashed and the nature and extent of the discretion vested with the authority and other similar considerations. Our attention has been drawn to many English cases in which writs of *certiorari* have been issued by the King's Bench in England. In some of them it looks as if the line of differentiation between a judicial and administrative act was very faint. But whether any particular function was of a judicial character or not in those cases depended on the provisions of the particular statutes concerned and no good purpose would be served by reviewing them.

Now what are the functions of the Magistrate under S. 3 (1) of the Press Act? Every keeper of a Printing Press is required to deposit security and all that the Magistrate has to do is to say what should be the amount of security provided it is not less than Rupees 500 or more than Rs. 2,000. The matter is left entirely to his discretion and so is the question whether he should or should not cancel or vary any order that he may make in this connection. He is not required to hear the owner of the printing press or to take any evidence. He is not to conform to any conditions or formality before passing any such order. In fact it cannot be said that there is any "case" "or cause" before him which he has to adjudicate upon. The discretion which is vested in him, such as it is, is absolute; it has all the attributes of an executive and not a judicial discretion. I do not see how it would be possible for any one asked to revise such an order as the Magistrate is empowered to pass, to say whether it is proper or not. No doubt when a Magistrate dispenses with the deposit of security, he can do so only for special

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of the words used by the legislature. Section 3 (1) imposes a serious disability on persons desiring to keep printing presses; it must have the effect of hampering the carrying on of what is ordinarily not only a perfectly legitimate business, but one which has played such an important part in the diffusion of knowledge and progress of civilisation."

6. "Upon this application, however, it is not open to us to set aside the order of the Chief Presidency Magistrate. Whether S. 22 of this Act bars all interference on our part or not is a question which will have to be considered in connection with another application which will be dealt with later. But in any case, there is no provision in the Press Act of 1910 under which this application is made which enables us to deal with the order of the Magistrate purporting to be made under S. 3 (1)."

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reasons to be recorded by him. Having regard however to the whole scheme of the Act, I do not think that those reasons are required in order to enable the High Court to make any pronouncement upon them. They are apparently required for the information of Government. What is also of importance in judging of the intentions of the legislature as to whether the proceedings of the Magistrate under S. 3 (1) are to be regarded as judicial in character or not is the provision of S. 22 by which Magistrates purporting to act under the Act are especially exempted from all civil or criminal liability. That would not have been necessary if the Magistrate in exercising his powers under section 3 (1) were acting as a judicial tribunal.

The Indian decisions which approach at all near this case are *Sivagami Achi* v. *Subrahmania Ayyar* [1], where it was held by a Full Bench of this Court that the proceeding of a Court under S. 287 of the Code of Civil Procedure settling a proclamation of a sale of property in execution is of an administrative and not of a judicial character, *Shankar Sarup* v. *Mejo Mal* [2], where an order of distribution under S. 295 of the Code of Civil Procedure was held by the Privy Council to be in the nature of an administrative act, *Minakshi* v. *Subramanya* [3], which decides that no appeal lies from an order of a District Judge appointing a member of a Committee of a temple, and *Vijiaraghavalu Pillai* v. *Theagaroya Chetti* [4], in which it was held that the High Court has no jurisdiction to revise an order passed by a Presidency Magistrate in an enquiry held by virtue of the rules framed by Government under the Madras City Municipal Act, III of 1904 as to the competency or otherwise of a candidate for a Municipal election.

Mr. C. P. Ramaswami Aiyar who argued the case of the petitioner with great ability referred us to a number of decisions of the Calcutta High Court in which they set aside orders of District Judges declaring certain persons to be touts within the meaning of the Legal Practitioners' Act. It is perfectly clear from S. 36 of that Act that the function to be exercised by the Courts mentioned therein is judicial in nature. They have to hear the persons sought to be proceeded against and to take evidence and their order must conform to certain conditions.

1. (1903) I. L. R. 27 M. 259.
2. (1900) I. L. R. 23 A. 313.
3. (1887) I. L. R. 11 M. 26.
4. (1914) I. L. R. 38. M. 581.

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The other contention of the Advocate General that proceedings will not be removed into the superior Court by a writ unless they are capable of being determined there is also well established (see Halsbury, Vol. 10, para. 335, page 170 and the cases cited there). None of the matters which are left to the determination of the Chief Presidency Magistrate by S. 3 (1) of the Press Act are such that this Court would be in a position to deal with at all satisfactorily. A writ is granted only in respect of matters which but for some especial legislation creating especial tribunals would have been within the ordinary jurisdiction of the superior Court. The Press Act has conferred upon the Presidency Magistrate novel powers which were never known to be exercised by this Court or by any Subordinate Court in the land. He is to take security from every person keeping a Printing Press and it is left entirely to his discretion whether to dispense with the security or not. There need be no question of the likelihood of the owner of the Press committing any offence or doing any acts to the injury of the public or of any individual, as in the cases covered by Chapter 8 of the Criminal Procedure Code.

I may also notice here the contention of the Advocate General that the Indian Press Act of 1910 is a self-contained enactment. He points out that it provides for its own rules of procedure and evidence, (see Ss. 21, 25 and S. 20) creates a special Court of Appeal for revising certain orders passed under the Act (S. 18) and expressly limits jurisdiction of the ordinary Courts in respect of the principal matters dealt with by the Act (S. 22). None of these provisions however singly or collectively have necessarily the effect of taking away our revisional jurisdiction over the proceedings of the Magistrate if he was acting judicially.

The legislature, however in delegating to the Magistrate the functions under S. 3 (1), does not regard him as a Court but as an Executive Officer entrusted with the performance of certain administrative duties. If an executive or an administrative Officer acts in excess of his powers, such acts are not liable to be reviewed by the High Court whether by means of a writ of *certiorari* or under its ordinary revisional powers. The only remedy open to an aggrieved person in such cases would be by an action.

The petition is dismissed.

Ayling, J.

Ayling, J:—This is a petition presented on behalf of Mrs. Annie Besant, Editor of "New India" and keeper of the "New India Printing Works." It is connected with O. P. No.

122 of 1916. In that petition presented under S. 17 of the Press Act (I of 1910) we were asked to set aside the order of forfeiture of security passed by the Madras Government on 25th August 1916 under S. 4 of the same. The present petition which was presented during the hearing of the other asks for the cancellation of an earlier order of the Chief Presidency Magistrate, dated 22nd May 1916, in which he required petitioner to deposit security to the amount of Rs. 2,000 under S. 3 (1) of the Act. This security was duly deposited; and is the security which was declared forfeited by the order of Government dated 25th August 1916.

The main ground alleged in the present petition for setting aside the Chief Presidency Magistrate's order is that it was passed without jurisdiction; but S. 7 of the petition runs

"7. That the order of the Magistrate is further invalid because the Press Act or in any event S. 4 thereof is *ultra vires* of the powers of the Governor-General in the Legislative Council."

This was not seriously pressed. We have nothing to do here with S. 4. If, as is suggested, the whole Press Act is *ultra vires* and of no effect, it is open to petitioner to seek her remedy in the ordinary Courts. It is no possible ground for the exercise of our revisional jurisdiction.

The contentions of Mr. C. P. Ramaswami Aiyar, who argued the case very ably and fully for the petitioner, may be summarised as follows:

A. That the order of the Chief Presidency Magistrate, dated 22nd May 1916, was *ultra vires*, because, by a previous order, dated 2nd December 1914, he had passed an order dispensing with security in respect of this Press, and had thereby exhausted his powers under S. 3. He could not afterwards "cancel or vary" it.

B. That it is open to us to set aside the said order dated 22nd May 1916 in exercise of our powers under Ss. 106 and 107 of the Government of India Act of 1915.

(Section 435 of the Criminal Procedure Code was also referred to in the petition; but was not relied on in argument as adding anything to the above.)

C. That we should exercise our power and set the order aside.

It is not suggested that we can order return of the security; but that our order will set petitioner free to pursue her remedy further at Common Law.

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Each of these positions requires careful examination.

The first, A, depends on the proper construction of S. 3 (1) of the Press Act, which runs as follows:

"Every person keeping a printing-press who is required to make a declaration under S. 4 of the Press and Registration of Books Act, 1867, shall, at the time of making the same, deposit with the Magistrate before whom the declaration is made security to such an amount, not being less than 500 or more than 2,000 Rupees, as the Magistrate may in each case think fit to require, in money or the equivalent thereof in securities of the Government of India.

Provided that the Magistrate may, if he thinks fit, for special reasons to be recorded by him, dispense with the deposit of any security or may from time to time cancel or vary any order under this sub-section."

It is beyond dispute that on 2nd December 1914, the Chief Presidency Magistrate passed an order under the first part of the proviso dispensing with the deposit of any security for the petitioner's press. The contention is that this order is irrevocable: and that, once it is passed, the press is exempt from all possible liability for security under the Act as long as it remains in the same hands.

It is argued, (1) that the words "any order under this section" do not cover an order dispensing with security; and (2) that the proviso merely gives the Magistrate an option of two alternatives (*a*) to dispense, (*b*) to cancel or vary, of both of which he cannot avail himself.

Some argument was also devoted to the question of whether the clause requiring the record of special reasons applied to an order cancelling or varying. I feel no doubt whatever that they do not. Their position, enclosed between the words "may" and "dispense," to my mind clearly indicates that their operation is limited to an order dispensing with security. If the first "may" followed instead of preceded the words "if he thinks fit, for special reasons to be recorded by him", it would be different.

Now returning to the first argument above recited, it is, I think, clear that the term "proviso" as applied to the second paragraph of sub-S. 3 (1) is a misnomer. As pointed out by the learned Officiating Chief Justice in the course of argument, the effect of the paragraph is simply to give the Magistrate additional powers over and above those conferred by the first paragraph. To

quote from Lord Halsbury "The substance, and not the form, must, however, be looked at, and that which is in form a proviso may in substance be a fresh enactment, adding to and not merely qualifying that which goes before." Halsbury's Laws of England, Volume 27, page 137.

This being so, the sub-section must be treated as a whole; and there is no reason why the words "any order" should not cover an order dispensing with security. As the Advocate General very pertinently argued, had the intention of the framers of the Act been that ascribed to them by Mr. Ramaswami Aiyar, in place of "any order under this sub-section", we should have "any *other* order under this sub-section". There is no reason why we should read into the "proviso" the word "other" as petitioner's case requires us to.

Just as the first argument requires the insertion of the word "other", so, it seems to me, the second argument requires the insertion of the word "either" after the first "may". It is hardly necessary to say that where a person is by statute empowered to take a course A or take a course B, the one is not necessarily exclusive of the other and in fact, will not be, unless there is something to suggest a choice between two alternatives. There is nothing of the kind here: and the words "from time to time" are strongly against such an interpretation.

The sub-section may not be a triumph of draftsmanship: but its meaning seems to me to be reasonably clear. It is designed to give the Magistrate the fullest discretion both as regards requiring security and determining the amount: and this discretion is to be exercised not once for all, but may be revised from time to time

If this be, as I think, the true construction, then the order of the Chief Presidency Magistrate passed on 22nd May 1916 was perfectly legal.

Passing then to the second point B, supposing that the order of the Chief Presidency Magistrate of 22nd May 1916, was bad for want of jurisdiction by reason of his previous order dated 2nd December 1914, what powers of interference do we possess ?

The petition as originally presented referred us to S. 107, Government of India Act, 1915, which is substantially identical with S. 15 of the Charter Act but at the outset of the hearing petitioner was allowed leave to add S. 106 of the same. The object was to include the power of interference by way of *certiorari* which was said to be covered by the latter section. Neither side

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were able to refer us to a single instance in which this power has been exercised by this Court, and whether S. 106 really adds anything to the powers of superintendence under S. 107 was the subject of much argument; as also whether this was a case of the class to which writs of *certiorari* apply. The main difficulty in petitioner's way is, however, S. 22 of the Press Act. This runs as follows:—

Every declaration of forfeiture purporting to be made under this Act shall, as against all persons, be conclusive evidence that the forfeiture therein referred to has taken place, and *no proceeding purporting to be taken under this Act shall be called in question by any Court, except the High Court on such application as aforesaid,* and no civil or criminal proceeding, except as provided by this Act, shall be instituted against any person for anything done or in good faith intended to be done under this Act.

The second clause which I have italicised is the important one, and everything turns on the effect to be given to it. It seems to me to be absolutely comprehensive. To quote the language of Jenkins, C. J. in connection with another section of the Act. "Its language is as wide as human ingenuity could make it."

I cannot for a moment entertain the suggestion that it only applies to proceedings by way of forfeiture. There is nothing to support such a reading. The language is clear—"no proceeding purporting to be taken under this Act": and it must be held to include the proceedings of a Magistrate under S. 3 (1).

I must also reject without hesitation the argument that the Chief Presidency Magistrate's order dated 22nd May 1916 did not purport to be one under S. 3 (1). A perusal of this order itself is sufficient.

Mr. Ramaswami Aiyar has, however, argued that in spite of this section, the power of the Court to interfere by way of *certiorari* is left unaffected, provided the proceedings were taken without jurisdiction. The case mainly relied on by him is that of *Ex parte Bradlaugh* [1] in which the learned Judges held that a section in an Act of Parliament taking away *certiorari* did not apply where there was an absence of jurisdiction, or, as Cockburn, C. J. put it, "where the application for the *certiorari* is on the ground that the inferior tribunal has exceeded the limits of its jurisdiction."

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I have very carefully considered this decision, but it seems to me that the principle therein enunciated is not applicable to the present case. Whether the power of interference by *certiorari* is taken away absolutely or only in respect of proceedings with jurisdiction must depend in each case on the wording of the statute which takes the power away. No one contends that it is not within the competence of the Legislature to take it away altogether; and in cases of a newly constituted offence or liability, it might, without any undue jealousy of the power of the Court, elect to do so. It is in this connection that the greatest importance attaches to the words in S. 22 "proceeding purporting to be taken under this Act". There is nothing corresponding to this in 2 and 3 Vict. C. 71, the Act which was relied on as taking away the *certiorari* in *Ex parte Bradlaugh* [1]. This, as it seems to me, makes all the difference. The reason underlying the decision above quoted and others to the same effect is thus concisely stated by Lord Halsbury: "Although *certiorari* is taken away, it may be granted even on the application of the defendant where the inferior Court has acted without or in excess of jurisdiction *for in such a case the Court has not brought itself within the terms of the statute taking away certiorari*".

Here the jurisdiction of this Court is equally barred in respect of proceedings *purporting* to be taken under the Press Act, as in respect of proceedings taken under the said Act with jurisdiction.

There is really nothing very startling in this view of the matter. The Press Act is an entirely new enactment brought into force in the interests of public tranquillity and imposing novel liabilities on the keepers of presses and publishers of newspapers chiefly in the matter of security. As far as can be seen it is self-contained and complete: and reference to the Courts of Law is only left open by S. 23 (which relates to prosecution before a Magistrate for failure to deposit security), and applications to this Court under S. 17. As regards the latter, Ss. 17—21 limit most carefully the scope of the enquiry; and the nature of the order to be passed: they also provide for the constitution of a special tribunal, and for the enactment of special rules for its procedure together with a special provision as regards evidence (S. 20). Apart from this, S. 22 bars the jurisdiction of all Courts as regards proceedings purporting to be taken under the Act. It is open to any one to argue that the enactment is unnecessary

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or impolitic: but there is nothing which would justify us in refusing to give effect to what seems to be its plain meaning. I am of opinion that by reason of S. 22 it is not open to us to set aside the Chief Presidency Magistrate's order.

Either of the above points is sufficient to dispose of the petition: and I only add a few words because they are both points on which I have the misfortune to differ from the learned Officiating Chief Justice and from my learned brother, Seshagiri Aiyar, J. There remains the question of whether the order of the Chief Presidency Magistrate is of such a nature that we could interfere with it under S. 106 or 107 of the Government of India Act even if we were not prevented by S. 22 of the Press Act. This is a matter in which I feel considerable doubt due chiefly to the very wide interpretation given by the English Courts in numerous cases to the expression "Judicial act." I recognise however the force of the arguments on the other side: and will merely say that if it were in my view necessary to determine this question I should not be prepared to dissent from the conclusion arrived at by the learned Officiating Chief Justice and Seshagiri Aiyar, J. I would however prefer to base my decision on the grounds set forth above.

I may add that, even assuming that we possess the power of interference under either section, it would still be, to me, a matter of grave consideration, whether that power should be exercised in this case. (Point C). I am not prepared to accept the Advocate General's contention that by depositing the security as required by the order, petitioner waived her right to subsequently question its validity. But if the order was illegal, it was open to her to petition this Court the very next day to exercise its powers under Ss. 106 and 107. Instead of this she took no action whatever till more than 3 months later when the Government, proceeding on the assumption that the initial order of the Magistrate was valid, took further steps under S. 4 and forefeited the security. In other words, she waited until the matter had reached another stage altogether before questioning the legality of the order.

Our exercise of these extraordinary powers is always discretionary: and I doubt whether in such circumstances we should feel called upon to exercise our power.

I would dismiss the petition.

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Seshagiri Aiyar, J.

Seshagiri Aiyar, J.—This is an application to revise the order of the Chief Presidency Magistrate calling upon the petitioner to deposit security. Mr. C. P. Ramaswami Aiyar asked the permission of the Court, at the outset, to include S. 106 of the Government of India Act of 1915 among the provisions of law he relied on. The point argued related to the powers of the High Court to call up and revise the proceedings of the learned Chief Presidency Magistrate. Before dealing with the specific questions discussed, a short resume of the history of the jurisdiction of the High Court over such matters may be given.

In the Letters Patent establishing the Supreme Court of Judicature at Madras, dated 26th December 1800 (39 and 40 Geo III, Chap. 79), it was stated that the Court "shall have such jurisdiction and authority as our Justices of our Court of King's Bench have, and may lawfully exercise, within that part of Great Britain, called England, as far as circumstances will admit." By 24 and 25 Vict. Chap. 104, the High Court was constituted. Under S. 9 of the Act it was provided that "the High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of such last mentioned Courts". By S. 8, the Supreme and the Sudder Courts were abolished, and the records of those Courts became "records and documents of the High Court established in the Presidency". It is thus clear that the High Court inherited all the powers which the old Supreme Court had. S. 10 which deals with the powers exercised over persons living beyond the local limits of the original jurisdiction need not be considered in this connection. The Letters Patent accompanying the chapter distinctly enacts by S. 16 that "the said High Court of Judicature at Madras shall have the like power and authority with respect to the persons and eatates of infants, idiots and lunatics, whether within or without the Presidency of Madras, as that which is now vested in the said Supreme Court of Madras". Then came 28 Vict. Chap. 15. The Letters Patent issued with reference to this statute re-enacted by S. 17 the powers given already, and stated that the powers hitherto "exercised before the publication of these presents" shall vest in the High Court. The Consolidating Act of 1915 confirms the said powers by enacting that the High

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Court shall have such jurisdiction "as are vested in them by Letters Patent, and, subject to the provisions of any such Letters Patent, all such jurisdiction powers and authority as are vested in those Courts respectively at the commencement of this Act". It is apparent from these recitals that the High Court has the same powers over persons resident within the local limits of its ordinary original jurisdiction as are exercised by the Court of the King's Bench in England.

Mr. Ramaswami Aiyar's contention was that as the Chief Presidency Magistrate is subject to the appellate jurisdiction of the High Court, his order demanding security should be revised by us. He asked us to issue a writ of *certiorari* against the Magistrate's proceedings. The solution of this question involves the determination of the following among other points:—

A. Is the writ in form and substance available to the petitioner?

B. Is our jurisdiction taken away by virtue of the provisions of S. 22 of the Press Act?

C. Is the Chief Presidency Magistrate, in performing his duties under the Press Act, amenable to our jurisdiction?

D. Is the action of that functionary illegal or irregular?

As regards the first of these questions, the learned Advocate General argued that as the Press Act created a new kind of liability which cannot be said to correlate to any of the common law rights possessed by the subject, this Court inheriting the rights of the Court of the King's Bench, had no right to interfere. One broad proposition was advanced that the right to keep a press was not an inherent right of every subject. The learned Advocate for the Crown suggested that the right to have a press is analogous to the right to carry on any trade or profession and consequently, a license should be obtained in that behalf. This argument is so opposed to all ideas of free press and of free speech that we asked for some authority for this proposition. The learned Advocate General referred us to what obtained during the Third Republic in France and to the Press Laws passed in Ireland when the Coercion Acts were in force. The pre-amble to the Press Act does not say that this is an emergency measure passed to steer the country during times of apprehended danger. The Act is apparently a permanent addition to the statute book, intended to regulate the conduct of

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the press during peaceful and normal times. I do not think that the exceptional circumstances which made the authorities in France and Ireland regard the use of free speech and free writing as exercisable only on licenses obtained thereto have any analogy. In England, the law is clear that the right of free writing is a common law right. The early law on the subject is fully stated by Professor Blake Odgers in his article on the Liberty of the Press contributed to VIII Encyclopedia of the Laws of England, page 155. At its inception, Kings, Peers and Priests unaccustomed to the sarcasms printed against them resolved that printing presses should be under the King's supervision. Then a company of certain merchants was given the privilege of keeping a press. Afterwards the universities were each allowed to have one. In the days of Queen Elizabeth, the publications issuing from the press had to be read over by the bishops and the privy councillors. In 1637, the Star Chamber decreed that all printed matter should be submitted to licensers. After the abolition of the Star Chamber, the Long Parliament passed similar decrees. Against this Milton protested, in his famous work "A speech for the Liberty of Unlicensed Printing." In 1695, when the revision of statutes came up before the House of Commons, the law of the Long Parliament was omitted from the statute book after a conflict with the House of Lords. From that year onwards, the liberty of the press has not been interfered with. This short statement about the legal history of the English Press shows conclusively that the freedom of the press is not a "licensed calling"; but a common law right inherent in every subject, subject to certain limitations. Lord Mansfield in *Rex* v. *Dean of St. Asaph*, [1] said that "the liberty of the press consists in printing without any previous license, subject to the consequence of law." The principle recognised in England is that so long as free writing does not offend the law of libel, the press is unfettered. Lord Ellenborough in *Rex* v. *Cobbett* [2] stated: "The law of England is a law of liberty, and, consistently with this liberty, we have not what is called an *imprimatur*; there is no such preliminary license necessary. But if a man publish a paper, he is exposed to the penal consequences, as he is in every other act, if it be illegal." "The power of free discussion," said Lord Kenyon, C.J., in *Rex* v. *Reeves* [3] "is the right of every subject of

1. (1879) 8 T. R. 428 at 431. 2. 29 State Trials 41 at p. 49.
3. (1796) Peak, Add C. 86.

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this country." The latest pronouncement on this subject is that of Lord Russel of Killowen, C. J. in *Reg* v. *Gray* [1]. He said "the liberty of the Press is no greater and no less than the liberty of every subject of the Queen." Professor Dicey in commenting upon some of these cases says: "This principle is radically inconsistent with any scheme of license or censorship by which a man is hindered from writing or printing anything which he thinks fit, and is hard to reconcile even with the right on the part of the Courts to restrain the circulation of a libel, until at any rate, the publisher has been convicted of publishing it." Of course exceptional circumstances connected with the safety of the Empire may demand a departure from these principles, *e. g.* the appointment of a censor, etc. But I am unable to hold that the law as to freedom of writing in India is not an offshoot of the principles that obtain in England, but has been borrowed from the emergency laws of the Third Republic. I am prepared to hold that even after the Press Act, the right to keep a press and to use it is a common law right and has not the slightest resemblance to the exercise of a trade or calling for which a license should be taken out.

Another argument for the Crown was that a writ of *certiorari* contemplates that the High Court is capable of substituting its own judgment for that of the tribunal whose proceeding is revised, and that as we cannot say what the exact amount of the security should be and whether it should be demanded or not, we have no power to revise the order. I do not think that it is a condition precedent to the issue of the writ that we should be able to place ourselves, in the position of the Court whose order is complained against. The writ may assume various forms. It may be an order to transfer proceedings (see Ss. 526 and 528 of the Code of Criminal Procedure and Ss. 22 and 25 of the Code of Civil Procedure). It may relate to the stay of proceedings (the Code of Civil Procedure provides for this). It may seek to set aside orders or judgment (S. 115 of the Code of Civil Procedure, S. 435 of the Code of Criminal Procedure and S. 25 of the Provincial Small Cause Courts Act). In short, it is enough that in the exercise of our jurisdiction, we direct the lower Court to reconsider its order or judgment. I am, therefore, of opinion that the fact that we cannot place ourselves in the position of the Chief Presidency Magistrate is not a bar to our entertaining the application.

1. (1900) 2 Q.B. 36 at p.40.

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The learned Advocate General also seemed to suggest that as the right to issue the writ has now been engrafted into legislative provisions, the old prerogative need no longer be invoked. The fact that our powers are recognised in legislative provisions is not an argument for holding that that power does not exist *aliunde*.

The next branch of the argument was that by S. 22 of the Press Act, the right, if any, possessed by us has been taken away. As I read the section I am unable to understand it as expressly or even by implication taking away the power of the High Court. All that can be said is that the Act does not provide for the order under S. 3 being revised. It is now well settled that unless the power to issue a writ of *Certiorari* is expressly taken away, it inheres in the Court. It was held in *R.* v. *Reeve* [1], that the writ being one for the benefit of the subject, cannot be taken away *without express negative words*. See also *R.* v. *Jukes* [2], and *R.* v. *Plowright* [3]. The English Judges have been so jealous in preserving this right, that they have held that even when the legislature provided that certain matters shall be finally determined by an inferior Court, the Court of King's Bench was not powerless, *R.* v. *Reeve* [1]. I am therefore clear that S. 22 has not taken away the right.

Moreover, even if the right is taken away, the High Court can interfere, if there has been a want of jurisdiction in the inferior Court. The reason of the rule is that the power *prima facie* exists in the High Court in all matters which are not within the cognisance of the inferior Court; and when this latter Court acts beyond its powers, it usurps jurisdiction which the High Court can control. The leading authority on the subject is *Ex parte Bradlaugh* [4]. Mellor, J. stated in that case that " it is well established that the provision taking away the *certiorari* does not apply when there was an absence of jurisdiction." *The King* v. *The Justices of Somersetshire* [5], *The Queen* v. *Wood* [6], are to the same effect. In *The Queen* v. *The South Wales Railway Co.* [7], Coleridge, J. stated " where that (want of jurisdiction in the inferior Court) is made out, the statutory prohibition does not apply and the inherent jurisdiction of this Court is unrestrained."

1. (1760) 2 Burr. 1040.
2. (1800) 8 T.R. 542.
3. (1686) 3 Mod. Rep. 94.
4. (1878) 3 Q. B. D. 509.
5. (1826) 5 B. and C. 816.
6. (1855) 5 E. and B. 49.
7. (1849) 13 Q. B. 988.

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It is on this principle that the High Courts in this country have acted in interfering with orders passed by Magistrates under section 145 of the Code of Criminal Procedure. Section 435, clause (3) would seem to suggest that High Courts should not revise orders passed under Chapter XII and S. 176. But there are no positive words affecting the jurisdiction of the High Court. Consequently, there has been a long course of decisions holding that the prohibition did not affect our powers of interference when want of jurisdiction was made out. This absence of jurisdiction "may be founded upon certain proceedings which have been made essential preliminaries to the inquiry or upon facts or facts to be adjudicated upon in the course of the inquiry." See *Colonial Bank of Australasia* v. *Willan* [1], *and Rex* v. *Woodhouse* [2]. A further qualification has been introduced in favour of the interference of the Court of the King's Bench. Even when jurisdiction to issue the writ was expressly taken away, if fraud has been practised in the procuring of the judgment the writ can issue. *R.* v. *Gillyard* [3].

I shall now consider the third question. I had considerable doubts during the course of the argument upon this subject. Mr. Ramaswami Aiyar and the learned Advocate General placed before us a bewildering array of authorities. The question whether a particular act done by an avowedly judicial tribunal is performed by that tribunal ministerially or judicially is not easy to determine. I concede that *prima facie* an order passed by an officer who acts ordinarily judicially may be presumed to have been passed by him in that capacity. I shall also grant that the officer need not be sitting as a Court to attach to himself judicial functions. The fact that he may have to take evidence is not a conclusive test of acting judicially. In *Rex* v. *Woodhouse* [2]. Vaughan Williams, Lord Justice doubted " whether the fact that there was no jurisdiction to make an administrative as distinguished from a judicial order would enable the Court to issue a *certiorari.*" Lord Justice Fletcher Moulton, after an elaborate discussion on the meaning of the terms "judicial acts" and "administrative acts" says; "The true view of the limitation would seem to be that the term "judicial act" is used in contrast with purely ministerial acts. To these latter the process of *certiorari* does not apply, as for instance to the issue of a warrant to enforce a rate, even though the rate

1. (1874) L. R. 5 P. C. 417 at p. 442. 2. (1906) 2. K. B. 501, at p. 515.
3. (1848) 12 Q. B. 527.

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is one which could itself be questioned by *certiorari.* In short, there must be the exercise of some right or duty to decide in order to provide scope for a writ of *certiorari* at common law." The position is thus succinctly expressed in 6 American Cyclopedia 753; "It necessarily follows that the writ will not lie to review acts which were not done in the exercise of judicial power or authority, but were merely ministerial, executive, or legislative in their character." I do not propose to examine the English authorities any further. I am bound, however, to consider a few Indian decisions. The most important of them is that of the Judicial Committee in *Shankar Sarup* v. *Mejo Mal,* [1]. The question related to the construction of S. 295 of the old Code of Civil Procedure. Lord Robertson in delivering the judgment of the Board said: "The scheme of S. 295 is rather to enable the judge as a matter of administration to distribute the price according to what seem at the time to be the rights of parties without this distribution importing a conclusive adjudication on those rights, which may be subsequently readjusted by a suit such as the present." In making the distribution, the Court had to hear parties and to decide upon the merits. Mainly relying upon this decision, a Full Bench of our High Court held in *Sivagami Achi* v. *Subramania Ayyar* [2] that a District Munsif acting under S. 287 of the Code of 1882 was only performing a ministerial duty and that his proceedings were not subject to revision by the High Court. The District Munsif in settling the proclamation under that section was entitled to take evidence and to come to a conclusion on the question. The learned Judges were much influenced by the circumstance that by S. 288 the officer was given the same protection from being proceeded against for damages as Act XVIII of 1850 gave to ordinary Judicial officers. The inference they drew was that in settling the proclamation, he was not acting judicially. This proposition applies with equal force to the present case. Then there is the decision in *Vijiaraghavalu Pillai* v. *Theagaroya Chetti* [3] to which I was a party with my learned brother Mr. Justice Ayling. I do not think the present case is stronger than that. In Calcutta, we have *Rudolf Stallmann* v. *Emperor* [4] and *Gulli Sahu* v. *Emperor* [5] which support the view taken in the Madras case. Reference

1. (1900) I. L. R. 23 All. 313.
2. (1903) I. L. R. 27 Mad. 259.
3. (1914) I. L. R. 39. Mad. 531.
4. (1911) I. L. R. 38 Cal. 547.
5. (1914) I. L. R. 42 Cal. 793.

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should also be made to *Minakshi* v. *Subramanya* [1] in which the Judicial Committee held that a District Judge in appointing a committee member under S. 10 of Act XX of 1863 was performing a ministerial duty. As against these decisions may be put the decision in *Nundo Lal Bose* v. *The Corporation for the Town of Calcutta* [2]. In that case, however, some judicial authority was given to the tribunal. On the whole, I am inclined to the view that the Chief Presidency Magistrate was not acting judicially when he called upon the petitioner to deposit security. An examination of the provisions of the Press Act leads to the same conclusions. (*a*) There is nothing in the Act which compels the Magistrate to hold any enquiry, although I do not say that he is debarred from doing so. (*b*) The nature of the information to be laid before him is not specified—Mr. Ramaswami Aiyar has drawn our attention to the fact that an application was made, as a matter of fact, by Mr. Brightwell. (*c*) The Magistrate is not bound to state any reasons. (*d*) He has an unfettered discretion in fixing the amount. (*e*) A special provision is made in S. 22 of the Act granting the same protection for proceedings passed in good faith as are secured to Judicial officers by Act XVIII of 1850. These considerations have influenced me in holding that the action of the Chief Presidency Magistrate was not judicial but only ministerial.

The last point for consideration is whether in the exercise of the power given to him by the Act, the Chief Presidency Magistrate acted illegally. Sub-section (1) of S. 3 before it reaches the proviso has two substantive provisions: (1) The keeper of the press shall make a deposit at the time of the declaration, and (2) that the amount of the deposit shall be fixed by the Magistrate between Rs. 500 and Rs. 2,000. The first requirement is imperative. The second gives a discretion to the Magistrate. The proviso also consists of two parts: (1) The Magistrate may for special reasons to be recorded by him dispense with any security, and (2) he may from time to time cancel or vary any order under the sub-section. From the context it is clear that the power to dispense with the security only qualifies the rule which imposes the security. The first part of the proviso, to my mind, is a conditional avoidance of the antecedent clause to demand the security. It should be regarded as a defeasance clause to the first part of the section. The second proviso naturally would govern

1. (1887) I. L. R. 11 Mad. 26.

2. (1885) I. L. R. 11 Cal. 275.

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the power to vary given in the second portion of the section. When the Legislature gave a discretion to the Magistrate to fix the amount, it also gave him power to vary the amount from time to time. It would, therefore, seem that the second part of the proviso should be read as qualifying the clause which gives discretion to demand a varying security. The learned Advocate General naturally laid stress upon the use of the words "*vary any order*" under this sub-section. Those words are capable of including orders passed under the proviso; but it has to be noticed that the clause calling upon the Magistrate to record special reasons cannot grammatically be read with the clause beginning with "or may from time to time vary etc." Is it reasonable to hold that an order which necessitated the record of reasons at its inception was intended to be capriciously set at nought the next moment. That would be imputing incongruity to the Legislature. Further the use of the disjunctive participle *or* seems to suggest that the order contemplated by the second clause of the proviso is different in nature from that which the first part enables the Magistrate to make.

I have thus far submitted the section itself to a close analysis. Very able arguments were addressed to us on both sides upon the meaning and office of a proviso. A great deal would depend upon the draftsmen. A proviso may at times serve to introduce an exception. It is often in the nature of a condition precedent to the enforcement of the operative clause. It is doubtful whether it can ever add to the clause itself. The learned Advocate General referred us to *Rhondda Urban Council* v. *Taff Vale Railway* [1]. In that case, the so-called proviso was in a separate section. It was held that this new section created a new liability. I do not think this case helps us much. Nor does *Mohammed Bahadoor Khan* v. *The Collector of Bareilly* [2] decide that a proviso can add to the section. On the other hand, Lord Chancellor, Lord Watson and Lord Herschell held in *West Derby Union* v. *Metropolitan Life Assurance Society* [3] that a proviso cannot enlarge the scope of the section. In a later case, Lord Justice Fletcher Moulton says: "The fallacy of the proposed method of interpretation is not far to seek. It sins against the fundamental rule of construction that a proviso must be considered with relation to the principal

1. (1909) A. C. 253. 2. (1875) L. R. 1 I. A. 167.
3. (1897) A. C. 647.

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matter to which it stands as a proviso. It treats it as if it were an independent enacting clause instead of being dependent on the main enactment. The Courts, as for instance in such cases as *ex parte Partington.* [1] *In re Brockelbank,* [2] and *Hill* v. *East and West India Dock Co.* [3], have frequently pointed out this fallacy, and have refused to be led astray by arguments such as those which have been addressed to us, which depend solely on taking words absolutely in their strict literal sense, disregarding the fundamental consideration that they appear in a proviso". See *Rex* v. *Dibbin* [4]. The preponderance of authority is in favour of the view that a proviso annexed to a section should not be read as enlarging the scope of that section.

In the present instance we have first a clause making the deposit absolute; then a proviso which enables it to be dispensed with after recording reasons; and we are asked to add a new power which would allow the Magistrate to cancel the last order without assigning any reasons. I am free to confess that the language of the section is by no means clear. Nor are the authorities as to the construction of a proviso uniform. But I am not prepared to impute to the legislature the want of logic and reasonableness which the construction contended for by the Crown entails. I am therefore of opinion that the Chief Presidency Magistrate had no power to demand security after having dispensed with it at the time of the declaration.

But as I have held that the order was passed by the Magistrate in his executive capacity, I am of opinion we have no power to interfere in revision under the Government of India Act. It is hardly necessary to say that the petition has been argued with great ability on both sides.

A.-V. V.

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1. (1844) 6 Q. B. 649.
2. (1889) 23 Q. B. D. 461.
3. (1884) 9 App. Cas. 448.
4. (1910) Probate 57 at p. 125.

PRIVY COUNCIL.

Present:—Lord Parker of Waddington, Lord Sumner, Sir John Edge and Sir Lawrence Jenkins.

[On Appeal from the High Court of Judicature at Bombay.]

Shrinivasdas Bavri ... *Appellant* *

v.

Meherbai and others ... *Respondents.*

P. C.

Shrinivasdas Bavri *v.* Meherbai.

Vendor and purchaser—Marketable title—Effect of recitals in deeds—After what time they should satisfy a purchaser of the truth of the fact recited—Conditions in contract of sale—Title by limitation.

Where property had been mortgaged to A and B, the vendors under a contract of 1913, in order to prove that such mortgage had been paid off, produced a release of 1902 by B, which recited that A had died leaving B his sole heir. The purchaser asked for independent proof of the facts recited, but the vendors declined to furnish any. The purchaser thereupon refused to complete.

Held, that his refusal was justified, and that the vendors had not deduced a marketable title.

Appeal from a decree of the Bombay High Court, dated November 11, 1914, affirming a decree of Macleod, J.

By an agreement for sale dated October 18, 1913, the respondents agreed to sell certain land in Bombay Town to Appellant. The agreement provided that the vendors should deduce a marketable title to the property free from all reasonable doubts. The purchaser paid Rs. 5000 as earnest money.

By an agreement of charge dated April 26th, 1892, accompanied by deposit of title-deeds, the then owners of the property had mortgaged it to Damoderdass Sunderdass and Gordhandass Sunderdass. The vendors alleged that on August 9, 1892 the mortgage had been redeemed by payment of the amount due to the mortgagees, that Damoderdass died on July 4, 1902, leaving Gordhandass his only heir, and that Gordhandass on Sept. 30, 1902 released the property.

They produced a certified copy of the deed of release, which recited these facts.

The purchaser required evidence of the said facts, and made some further requisitions, but the vendors contended that the deed itself was sufficient evidence and did not comply with the other requisitions. The purchaser thereupon cancelled the contract and to get back his earnest money took out an originating summons to determine whether he had rightly cancelled it; but Macleod, J. held that the Respondents had made out a marketable title free from reasonable doubt and that Appellant's

* 7th December 1916.

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fears were fanciful. A decree to this effect was drawn up and affirmed on appeal by Scott, C. J. and Davar, J.

Hence this Appeal.

W. H. Upjohn, K.C., and *Sir W. Garth* for Appellant :—My main point is that (1) Damoderdas and Gordhandass were joint mortgagees, and there is no proof of discharge by one of them. The two other points are (2) the abstract of title commences only in 1888 and certain deeds were not produced (3) the vendors, having certain deeds in their power did not produce them.

As to (1) we were entitled to evidence binding the joint promisee. When a person has made a promise to two persons jointly, the right to claim performance rests with them both during their joint lives. Indian Contract Act, S. 45 (see also illustration). Payment to one mortgagee without special authority from the other does not discharge the property. *Matson* v. *Dennis* [1], *Powell* v. *Brodhurst* [2].

The production of the mortgage deed was no proof of the extinguishment of the interest of the deceased joint mortgagee, and no proper evidence of such extinguishment was tendered.

Respondents' case sets up that the charge was extinguished by limitation. This point was not taken below. There may be a question whether Art. 132 or Art. 147 of the Indian Limitation Act applies. I contend Art. 147 applies. *Vasudeva Mudaliar* v. *K. S. Srinivas Pillai* [3]; anyhow it is not fair to force on a purchaser a title depending on whether Art. 132 or Art. 147 applies. In any case the vendor should have offered us evidence that the period of limitation has not been extended by acknowledgment or payment under Ss. 19 and 20 of the Act.

As to forcing on a purchaser a title depending on limitation reference may be made to *Scott* v. *Nixen* [4] *Games* v. *Benner* [5].

The High Court seems to rely on the fact that the release was registered, but this registration proves only the existence of the document, not the fact of the release. Indian Registration Act, Ss. 52, 57, 58, 59, 60.

As to (2) the title was deduced for 25 years only and during that period three important deeds are missing. That is not a compliance with the contract, which provides for a marketable title free from any reasonable doubt.

1. (1864) 4 De. G. J. & S. 345. 2. (1901) 2 Ch. 160.
3. (1907) L.R. 34 I.A. 166 : s.c. I.L.R. 30 M. 42.
4. 3 Drew. & War. 388 at p. 405. 5. (1884) 54 L.J. Ch. 517.

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As to (3) they were bound to give us production and the information we asked for—Transfer of Property Act, 1882, S. 55 (1) (b) and (c).

Cunliffe, K. C., for Respondents :—There is a strict system of registration in Bombay. Since 1866 no document unless registered, can affect immoveable property there. Under these circumstances it is unsafe to apply analogies derived from English practice. The contract only requires us to deduce such title as a reasonable minded purchaser would accept. The vendors were ready and willing to satisfy all reasonable requisitions, but the purchaser abruptly broke off.

The mortgage here arose by deposit of deeds, and the purchaser only had to be satisfied that the deeds had gone back to the possession of the mortgagor. The charge is created by the deposit: the memorandum is merely conclusive evidence of the terms of deposit.

There is a presumption as to the reality of deeds executed and registered.

Shamchand Pal v. *Protop Chandra Pal* [1].

Further, the Statute of limitation applies; the period is 12 years, which has long since expired. There is nothing to support the supposition that any acknowledgment was given.

Raikes followed.

No reply was called for.

Their Lordships' judgment was delivered by

Lord Parker of Waddington.

Lord Parker of Waddington :—This appeal arises in a vendor and purchaser summons on the original side of the Bombay High Court under Rule 210 of the High Court Rules. The vendors were bound by their contract of the 18th October, 1913, to deduce "a marketable title free from all reasonable doubts" to the property they contracted to sell. The question is whether they have discharged this obligation. Both the Judge of first instance and the High Court on appeal have answered this question in the affirmative. The purchaser is now appealing to His Majesty in Council.

The material facts may be stated as follows: On the 26th April, 1892, Ramdass Kessowji, the then owner of the property contracted to be sold, joined with Dwarkadass Shamji, the owner of an adjoining property, in mortgaging both properties to

1. (1897) L. R. 24 I. A. 186 I. L. R. 25 C. 78.

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Damoderdass Sunderdass and Gordhendass Sunderdass to secure a lakh of rupees, with interest at 7½ per cent. per annum. The mortgage was effected by an agreement of charge duly registered. It appears from this agreement that the sum to secure which the mortgage was given was a debt due from the mortgagors to the mortgagees. The title-deeds relating to both properties are stated to have been deposited with the mortgagees. The principal debt is made payable by two instalments of 50,000 rupees each on the 30th September, 1892, and the 20th April, 1893, but the mortgagors were entitled to pay each instalment before its due date with interest up to the date of actual payment. Both mortgagors join in charging the properties. The agreement contains a proviso that on payment of either instalment with interest the mortgagors, or either of them, shall be entitled to redeem the title-deeds of one of the properties, and that a memorandum of such payment and redemption shall be endorsed on the agreement.

In order to make a title to the property the vendors must show that this mortgage has been cleared off. Their case is that about the 9th August, 1892, Ramdass Kessowji paid to the mortgagees the first instalment of 50,000 rupees with interest, and redeemed the title-deeds of the property contracted to be sold. As evidence of this they produce a certified copy of a release, dated the 30th September, 1902 (less than eleven years before the date of the contract), and duly registered, whereby after reciting such payment and redemption, and also the death of Damoderdass Sunderdass on the 4th July, 1902, leaving Gordhandass Sunderdass his only heir and legal representative, Gordhandass Sunderdass released the property contracted to be sold from the equitable charge created by the agreement of the 26th April, 1892. Obviously if it be the fact that when this release was executed Damoderdass Sunderdass was dead, and Gordhandass Sunderdass was his sole heir and legal representative, the equitable charge was effectually released. The purchaser therefore asked for evidence of these facts, but the vendors refused to supply such evidence on the ground that the recitals in the release itself were sufficient proof of the facts recited.

In their Lordships' opinion, it is quite clear that the recitals in a deed are, strictly speaking, evidence only as against the parties to the deed and those claiming through or under them. If, therefore, at the date of the release Damoderdass Sunderdass

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were living, or if, though dead, Gordhandass were not his heir or legal representative, there would be nothing to prevent either Damoderdass Sunderdass himself or those claiming through him from disputing the truth of the recitals contained in the release. The learned Judges in the Court below appear to have thought that the provisions of the Registration Act, 1877, had some bearing on this point, but if those provisions be referred to it is quite clear that they have no effect on the value as evidence of recitals contained in a registered instrument.

Although, however, recitals in a deed are only evidence as against the parties to the deed or those who claim through or under them, it has long been the custom of conveyancers, at any rate in this country, to provide in contracts of sale and purchase that recitals in deeds of a certain age shall be sufficient to satisfy a purchaser of the truth of the fact recited. The existence of such a custom is material whenever a purchaser is bound to accept a marketable title, for the insertion of a usual condition in a contract of resale could not be depreciatory. In this country the usual condition (now recognised by statute) is confined to deeds dated not less than twenty years before the contract, and there is no evidence of any custom among Bombay conveyancers relating to more recent deeds. In their Lordships' opinion, a condition making the recitals in the release of 1902 evidence of the facts recited would have been depreciatory, especially having regard to the fact that the vendors cannot produce one of the title-deeds deposited for the purpose of the equitable charge or the equitable charge itself.

It was argued that Damoderdass Sunderdass, if living, or, if dead, his heirs or legal representative, must be barred by the Limitation Act. This point was not taken in either of the Courts below, and it is doubtful whether it be open to the respondents to take it before this Board. Their Lordships, however, do not consider the point to be a good one. It is perfectly possible that there have been payments on account of the principal or interest secured by the equitable charge which would preclude the operation of the statute.

Their Lordship conclude, therefore, that the purchaser was justified in requiring evidence that Gordhandass Sunderdass was sole heir and legal representative of Damoderdass Sunderdass, and that the vendors having refused to supply such evidence have not deduced the marketable title which they were bound to deduce.

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Under these circumstances their Lordships will humbly advise His Majesty to reverse the orders appealed from with costs here and below, and to order the return to the purchaser of his deposit with interest at the usual rate allowed in such cases by the Courts in Bombay (or in case the parties differ, at a rate to be fixed by the High Court), and the cost of investigating the vendor's title.

Solicitor for Appellant:—*G. C. Farr.*

Solicitors for Respondents:—*E. F. Turner and Sons.*

A. P. P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

Present:—Mr. Justice Abdur Rahim, Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

Adikesavan Naidu and others ... *Appellants* * (*Defendants Nos. 3 to 5.*)

v.

M. V. Gurunatha Chetti and others ... *Respondents* (*Plffs. and defendants Nos. 1 and 2.*)

Adikesavan Naidu v. Gurunatha Chetti.

Contract to sell immoveable property—Manager of a joint Hindu family—Not binding on junior members—Personal liability of manager for damages for breach of contract—Indian Contract Act, S. 73—The Rule in Bain v. *Fothergill, applicability of to India—Transfer of Property Act, S.* 55 (2).

The manager of a joint Hindu family who has agreed to sell immoveable property belonging to himself and the minor members of the family is personally liable for failure to perform the contract when it is found that it is not binding on the minors, though both the contracting parties believed there was necessity and acted in good faith.

S. 73 of the Contract Act lays down the law in India as to the liability for damages for breach of contract, whether the contract was one which related to the sale of moveable or immoveable property.

The rule of law laid down in *Flureau* v. *Thornhill* [1] *and Bain* v. *Fothergill* [2] by which a person who enters into a contract for the sale of a real estate knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred by an action for breach of contract, does not apply to India.

Ranchhod v. *Manmohandas* [3] *Nabin Chandra Saha Paramanick* v. *Krishna Barana Dasi* [4] followed.

The law laid down in *Gaslight & Coke Co* v. *Towse* [5] is not applicable to this country.

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* A. No. 117 of 1912. 2nd November, 1916.

1. (1776) 2 W. Bl. 1078.
2. (1874) L. R. 7 H. L. 158.
3. (1907) I. L. R. 32 B. 165.
4. (1911) I.L.R. 38 C. 458,
5. (1887) L. R. 35 Ch. D, 519.

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Per *Abdur Rahim, J. Sadasiva Aiyar, J.* contra, Sec. 55 (2) of the Transfer of Property Act applies not only to cases where there has been a completed sale, but also when the parties have only entered into an agreement to sell.

Appeal against the decree of the District Court of Salem in Original Suit No. 6 of 1910.

[When the case came on for hearing in the first instance on 7—12—1914.]

The court (Wallis, C. J. and Seshagiri Aiyar, J.) delivered the following

Judgment:—In this case the father of defendants Nos. 1 and 2 in 1906 mortgaged the suit mittah for Rs. 3,000 the rate of interest being only 6 per cent. per annum and five years being allowed for repayment of the principal sum. In 1909, five months after the father's death, defendants Nos. 1 and 2 entered into an agreement, Exhibit A, to sell the mittah to the plaintiffs. Defendants Nos. 3 to 5, the minor sons of the 1st defendant, were then in existence and it is objected in their behalf that this transaction was not necessary or beneficial to them and that they are entitled to resist a claim for specific performance. At the date of the agreement Rs. 4,300 was due on the mortgage and in respect of a promissory note executed by the defendants: and on this ground, the District Judge has held that the contract was binding on the minors and has given to the plaintiffs a decree. We are unable to agree.

The mittah was then worth nearly Rs. 18,000, if not more, and the indebtedness was only Rs. 4,300. The family also owned other immoveable properties out of which the debt might have been satisfied by sale. Although it is said that it was intended to invest the balance in the purchase of ryotwari lands and that this would have been more profitable, there is no evidence that any arrangements to this effect had been made at the date of the contract sued on, and therefore the result of the transaction was to place the balance at the disposal of the 1st and 2nd defendants who might or might not invest it for the benefit of the family, and so to expose the interests of the minors to considerable risk. For these reasons, we are not satisfied that the transaction was for the benefit of the minors. As the minors are entitled to 3/8 of the whole, we think the provisions of S. 14 of the Specific Relief Act have no application. The decision in

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Gurusamy v. *Ganapathia*, [1]. which has been cited related to a contract entered into before the passing of the Act.

We therefore set aside the decree of the District Judge with costs of the appellants in both courts. It is however argued that in the plaint as framed there is a claim for damages in the circumstances which have happened against defendants Nos. 1 and 2 which should be adjudicated on. We have therefore resolved to call for a finding on the following issue:

"Are the plaintiffs entitled to any, and what, damages against defendants Nos. 1 and 2?"

The finding should be submitted within 6 weeks from this date and 7 days will be allowed for filing objections.

The Memorandum of Cross-Objections filed by the respondents Nos. 1 and 2 is dismissed with costs.

In compliance with the order contained in the above judgment, the District Judge of Salem submitted the following

Finding :—The High Court has, by its order dated 7th December 1914 in Appeal No. 117 of 1912, called for a finding on the evidence already on record, on the issue :—

"Are the plaintiffs entitled to any, and what, damages against defendants Nos. 1 and 2?"

2. At the hearing before me it was not disputed that the plaintiffs are entitled to recover damages from the first and second defendants, and the only question argued was as to the proper measure of these damages. The learned vakil for the plaintiffs suggested two alternative ways in which the damages might be measured. The first way is to include in the amount to be awarded as damages (1) the difference between the price of the plaint mittah as fixed by the contract between the parties and its market-value at the date of the breach of that contract; (2) the earnest money paid by the plaintiffs, together with interest thereon, at such rate as the court considers reasonable, from the date of the contract until date of payment; and (3) the amount of any costs or expenses which the plaintiffs have incurred by reason of the breach of contract. The alternative method of calculation proceeds on the assumption that from the date fixed for the performance of the contract, that is to say, from the 15th of November 1909, up to the date of the High Court's judgment reversing this court's decree for specific performance, that is, up to 7th December 1914, the plaintiffs kept a sum of Rs. 17,750 available for payment to the first and second defendants at any moment, and were thus deprived of the income which they might have acquired by the profitable investment of that sum during the said period. On this assumption it is proposed that the amount of the damages to be recovered by the plantiffs from the first and second defts should be taken to be the amount which might have been realised by the investment of Rs. 17,750 at, say, six per cent. per annum from 15th November 1909 to 7th December 1914, which would come to somewhere between Rs, 5,000 and Rs. 6,000. I do not think this latter method of estimating the loss sustained by the plaintiffs should be adopted. The assumption upon which it is based is not a reasonable one. It is

1. (1882) I. L. R. 5 Mad. 337 (F.B.)

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alleged, no doubt, that the plaintiffs tendered to the first and second defendants on 29th October 1909 a sum of Rs. 4,300 being the amount required for the discharge of a prior encumbrance on the plaint mittah, and again on the 4th November 1909 a sum of Rs 17,550 being the balance of the purchase-money ; and it is a fact that after the decree for specific performance was passed by this court, namely, on 10th April 1912, they deposited the sum of Rs. 17,550 in court; but there is no evidence to show, and it would scarcely be reasonable to presume, that they had kept this sum idle during the whole of the period intervening between 4th November 1909 and 10th April 1912 that is for nearly 2½ years. Moreover they drew the money out of court again on the 5th September 1912, and it must be presumed that they did so in order to prevent its lying idle any longer. In the circumstances it is clear that there are no sufficient materials available to serve as a basis for calculating the amount of damages according to the second method proposed, and that method cannot therefore be adopted. The other method is the one that was adopted by the High Court of Bombay in the case reported in *Ranchhod* v. *Manmohandas* [1] and it seems to be the proper method to be adopted here also. The vakil for the first and second defendants agrees to that.

3. As regards the details of the calculation it is conceded by the vakil for the first and second defendants that the plaintiffs are entitled to recover the Rs. 200 paid by them as earnest money with interest at such rate as is considered reasonable from 2nd October 1909 until date of payment. It is agreed that six per cent. per annum is a reasonable rate of interest and I accordingly fix that as the rate to be allowed.

4. There is no evidence to show that the plaintiffs have been put to any expense as a result of the first and second defendants' breach of contract, apart from their costs of the present litigation which I cannot take account of now, as it must be left to the High Court to determine the incidence of those costs in the usual course when it finally disposes of the appeal.

5. The only question that remains to be considered is what was the market-value of the plaint mittah at the date of the breach of contract. As regards this the vakil for the plaintiffs contends that it should be fixed at Rs. 28,000 or Rs. 24,000, and in support of the contention he relies on the evidence of the third and ninth witnesses examined on the side of the defendants. The third defence witness, a karnam, fixed the value of the mittah at Rs. 24,000 while the ninth witness swore that he himself had actually offered Rs. 23,000 for it. There does not appear to be any reason why this evidence should not be accepted. The learned vakil for the defendants has not referred me to any other evidence on the point. His suggestion is that I should take the market-value of the mittah to be Rs. 18,000 because that figure is mentioned in the judgment of the High Court (*Vide* paragraph 2). But it seems to me that the figure Rs. 18,000 is given there only as a minimum estimate of the value and that I am not debarred from finding that the market-value is more than that if there is evidence to support such a finding. The evidence to which I have been referred—that of the third and ninth defence witnesses—is no doubt somewhat meagre but it is sufficient, I think, in the circumstances of this case, to warrant me in finding that the market-value of the mittah at the period in question was not less than Rs 23,000. The first and second defendants cannot reasonably complain of this valuation seeing that they themselves in their written statements maintained that the mittah was worth upwards of Rs. 30,000. I therefore hold that at the time of the breach of contract the mittah was worth Rs. 23,000.

1. (1907) I. L. R. 32 B. 165, 172.

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6. It follows, then, that the plaintiffs are entitled to recover from the first and second defendants as damages a sum of Rs. 5,250 (Rs. 23,000—Rs. 17,750) *plus* Rs. 200 (the amount paid as earnest-money), and interest at six per cent per annum on the latter sum (Rs. 200) from 2nd October 1909 until date of payment, and I return a finding accordingly.

On return of the finding as above.

The court (Wallis, C J. and Seshagiri Aiyar, J.) made the following

ORDER OF REFERENCE TO A FULL BENCH :—

Wallis, C. J.

Wallis, C. J.:—The remaining question in this case which is one of some difficulty and importance is whether the plaintiffs are entitled to recover damages from defendants 1 and 2 for the failure to perform their contract of sale in respect of the 3/8 share of the minor members of the joint family who are the sons of the 1st defendant. Generally I assume that in India damages are recoverable for breach of a contract to sell immoveable property. It may be said generally that when a vendor who has only a partial interest contracts to sell the entirety, the purchaser may compel him to convey all his estate and interest and to allow compensation for as much as he cannot convey—Leake on Contracts, 3rd Edition, page 993 citing *Mortlock* v. *Buller* [1] where Lord Eldon indicates the opinion that a trustee who undertakes to sell trust-property may be made to pay damages even though in the circumstances of the case the contract cannot be specifically enforced. On the other hand in *Gas-light and Coke Company* v. *Towse*, [2] Kay, J., held that damages could not be recovered against a trustee who leased the trust-property for thirty years with a covenant for renewal for another like term, when on the expiry of the first term it turned out that to grant such a further term would not be beneficial to the trust-estate and the covenant was therefore unenforceable. Kay, J. held that the lessee must have taken the covenant with his eyes open knowing that when the time came it might be impossible to enforce it, and that he could not recover damages. "If he enters into it knowing exactly what the title of his vendor is, and that the carrying out of the contract eventually is subject to a possible difficulty, how can he turn round and say, 'although I entered into that contract with you knowing of that difficulty, still I hold you liable for damages' "? In the present case the recitals in Exhibit A show that the purchasers had notice that the property was the joint family property of the defendants' family, and that it was alleged that it

1. (1804) 10 Ves. 316. 2. (1887) 35 Ch. D. 519.

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Wallis, C. J.

was being sold to discharge this and other debts alleged to have been contracted for family expenses, and because the mittah was stated to be inconvenient to manage and it was desirable to sell it and invest the balance of the sale proceeds in some other manner. And according to the decision in *Hunoomanpersaud's* case [1], it was his duty before purchasing to enquire and satisfy himself as to the truth of the representations, and it is not alleged or proved in the case that the vendors in any way misled or deceived the vendee in the matter. It may therefore be argued that the purchasers knew the fact that the sale was liable to be set aside as not binding the other members of the family, and that they ought not on the analogy of the case last cited to be allowed to recover damages because the court had held the sale not binding on the minors. On the other hand it may be said that by S. 55 (2) of the Transfer of Property Act the vendor is deemed to contract with the buyer that the interest which the seller purports to transfer to the buyer subsists and that he has power to transfer the same. This is only "in the absence of a contract to the contrary," and where a seller of joint family property sets out the circumstances which he considers justify him in selling and the purchaser whose duty it is to satisfy himself as to the necessity of the sale, accepts the facts set forth as amounting to necessity, there is, I am inclined to think, sufficient ground for holding that the seller does not warrant that these facts will be accepted as sufficient by the court and that there is sufficient ground to imply a contract to the contrary within the meaning of the section. I may add that in the interests of the minor members of joint families I think it would be undesirable to hold unless we are forced to do so that such claims are enforceable. As however my learned brother is inclined to a different opinion and the question is a novel one we have decided to refer the following question to a Full Bench.

"Whether a manager of a joint Hindu family who has agreed to sell immoveable property belonging to himself and the minor members of the family is personally liable for damages for failure to perform the contract when it is found that it is not binding on the minors.

Seshagiri Aiyar, J.

Seshagiri Aiyar, J. :— I regret very much I am unable to agree with the learned Chief Justice on the question of the vendors' liability for damages.

1. (1856) 6 M. I. A. 393.

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Seshagiri Aiyar, J.

On the findings submitted by the District Judge some important questions of law were argued. Mr. V. C. Seshachariar contended that this court was bound to have directed the District Judge to receive fresh evidence as we were sending down a new issue for trial. See Order 41, Rule 25 of the Code of Civil Procedure. I am unable to agree. The pleadings and the issues did raise the question of damages. What we did was simply to recast it. The learned vakils who appeared at the hearing did not think it necessary that fresh evidence should be taken. There is no force in this contention.

The second contention of the learned vakil is that the purchasers are not entitled to any damages, as the agreement to sell related to immoveable property. I feel no doubt that the English cases quoted before us are not applicable to India. It is true that the case of *Flureau* v. *Thornhill* [1] has been affirmed by the House of Lords in *Bain* v. *Fothergill*, [2]. But the Indian legislature presumably with knowledge of the state of the law in England enacted a general rule as to damages for breach of contract in S. 73 of the Contract Act. This is applicable to contracts relating to moveable and immoveable properties alike. Moreover in this country, conveyancing is in its most infant stage and deeds are executed not under skilled advice and after a careful examination of the title, but by laymen unacquainted with legal precedents and principles. It would be highly inequitable under such circumstances to introduce the technical rule of English law on this subject here. Even in the West exceptions have been gradually introduced to mitigate the rigour of the rule in *Flureau's* case. If the vendor *refuses* to convey, he is liable to pay substantial damages. *Williams* v. *Glenton* [3]. So also where he has sold the property subsequently or where the vendor guarantees *expressly* good title. See Sedgwick on Damages, Vol. III, page 2110, cases at the footnote. It is now well settled in America that " if the defendant fails to convey because he has not a good title, he is always liable in substantial damages." 212 United States, 397. Apparently the Indian legislature has accepted this more equitable rule in S. 53 of the Contract Act. *Pitamber Sundarji* v. *Cassibai* [4] follows *Flureau's* case. But *Ranchhod* v. *Manmohandos* [5] and *Nabin Chandra Saha Paramanick* v.

1. (1776) 2 W. Bl. 1078.
2. (1874) L. R. 7 H. L. 158.
3. (1866) L. R. 1 Ch. App. 200.
4. (1886) I. L. R. 11 Bom. 272.
5. (1907) I. L.R. 32 B. 165.

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Seshagiri Aiyar, J.

Krishna Barana Dasi [1] decide that S. 73 is comprehensive and applies to breaches of contract arising from the sale of moveable as well as of immoveable property. I respectfully follow these later decisions.

On the third question argued, I give my decision with some hesitation. It was contended for the 1st and 2nd defendants that as the plaintiffs were bound to have satisfied themselves that the sale was binding on defendants Nos. 3 to 5, they were not entitled to any damages. The position is this: there was undoubtedly an ancestral debt to be paid. The 1st and 2nd defendants agreed to sell the property with the object of paying off that debt and of investing the balance of the sale-proceeds in the purchase of other lands. Defendants Nos. 3 to 5 are the sons of the 1st defendant. We held that it was not beneficial to these defendants who were minors that ancestral property should be converted into cash to enable their father to indulge in speculative purchases. There is no question of bad faith on either side.

The question to be decided is almost *res integra. Krishna Aiyar* v. *Shamanna* [2] assumes that the manager will be liable under similar circumstances. The respective obligations of the manager of a Hindu family and of the alienee from him have been laid down in the well-known case of *Hunooman Persaud.* It is unnecessary to quote the passage which deals with this matter. The case before the Judicial Committee was one of mortgage. The principle they laid down has been held applicable in numerous cases to sales. The principle enunciated in the above case when analysed comes to this: the power of the manager to sell family estate is not absolute. The manager should act prudently for the benefit of the estate. The purchaser ought to make *bona fide* enquiries regarding the necessity for the sale; and he has to satisfy himself that the manager is acting for the benefit of the estate. The difficulty arises where the manager has acted honestly and in what he conceived to be, the best interests of all the members of the family, and the purchaser also did make enquiries and believed that the transaction was beneficial, but the Court comes to the conclusion that both of them were mistaken and refuses to decree specific performance. I think the duty is heavier on the manager than upon the purchaser. The manager in making a representation speaks for himself as well as for the minors. If, later on, the minors repudiate his representation, he must be

1. (1911) I. L. R. 38 C. 468. 2. (1912) 23 M. L. J. 610.

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deemed to have made an untrue representation on behalf of the minors. I can think of cases where the purchaser does not take the ordinary precautions and acts recklessly. In such cases, the purchaser can claim no damages. But where both parties act to the best of their lights, but the Court is unable to uphold the transaction, the vendor must suffer. Both the Specific Relief Act and the Transfer of Property Act suggest that ordinarily the vendor guarantees good title. Even if the defect is not due to wilful concealment or misrepresentation, the law must cast on the guarantor the liability to make good the loss sustained by the purchaser. However as the question is one of first impression and of considerable importance, I agree with the learned Chief Justice that the question should be referred to the decision of a Full Bench.

T. R. Ramachandra Aiyar for Appellants.

V. C. Seshachariar for Respondents 3 and 4.

S. Varadachariar for *A. Krishnaswami Aiyar* for Respondents 1 and 2.

S. Aravamuda Aiyangar and *P. Sankaranarayana Aiyar* for Respondents No. 1.

The Full Bench expressed the following

Abdur Rahim, J.

Opinions:—*Abdur Rahim, J.*—The question referred to us is whether a manager of a joint Hindu family who has agreed to sell immoveable property belonging to himself and the minor members of the family is personally liable for damages for failure to perform the contract when it is found that it is not binding on the minors.

The facts briefly speaking upon which the question arises seem to be that the vendor the managing member of the family represented that circumstances existed which entitled him to sell the property and the intending purchaser, relying upon that representation, agreed to purchase the property. It is, however, found that the sale did not bind the minors' shares as there was no necessity for the sale though both the contracting parties believed that there was and acted in good faith. That, as I understand it, is the result of the findings of the learned Judges who have referred the question to the Full Bench.

There is no question but that section 73 of the Contract Act applies. Under this enactment it makes no difference as to the liability for damages caused by breach of contract whether the contract was for sale of moveable or immoveable property. It lays down that the aggrieved party is entitled to compensation for any loss or damage caused to him by the breach of contract

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which naturally arose in the usual course of things from such breach or which the party knew when they made the contract to be likely to result from the breach of it.

The learned Chief Justice is of opinion that the buyer in such a case as this is not entitled to damages, relying mainly on the decision in *Gas Light and Coke Co* v. *Towse* [1]. That decision was based by Mr. Justice Kay on the ruling in *Bain* v. *Fothergill* [2], in which it was held on the authority of *Flureau* v. *Thornhill* [3], "If a person enters into a contract for the sale of a real estate knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred by an action for the breach of the contract; he can only obtain other damages by an action for deceit." In the same case Lord Hatherly stated " a contract for sale of a real estate is very different indeed from a contract for a sale of a chattel, where the vendor must know what his right to the chattel is." Especial reliance is placed on a passage in the judgment of Kay, J. " If he (meaning the person in whose favour a trustee leased the trust property for a certain term with a covenant for renewal for another like term) enters into it knowing exactly what the title of his vendor is, and that the carrying out of the contract eventually is subject to a possible difficulty, how can he turn round and say 'although I entered into that contract with you knowing of that difficulty, still I hold you liable for damages?' " That observation again is founded on the doctrine that contracts for sale of immoveable property stand on a peculiar footing different from that of other contracts. That the rule in *Flureau* v. *Thornhill* [3], is of an anomalous nature and has been upheld mainly as it had been recognised in a series of cases in England extending over a long period of time and arising out of the peculiar difficulties of conveyancing with respect to immoveable property in that country, is made clear by the fact that English Judges themselves have refused to extend the doctrine any further. For instance it has been decided that the rule would not be applied to cases where the inability of the vendor to perform the contract was due to his not having first secured to himself the property which he assumes to sell or to his failure to make out the title due to his unwillingness to remedy the defect. See *Engel* v. *Fitch* [4] and *Day* v. *Singleton* [5]. Justice Fry in his book

1. (1887) 35 Ch. D. 519.
2. (1874) L. R. 7 H.L 158 : 96 E. R. 685.
3. (1776) 2 W. Bl. 1078.
4. (1868) L.R. 3 Q. B. 314.
5. (1899) II Ch. 320.

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on Specific Performance describes the rule established by *Flureau* v. *Thornhill* [1] and *Bain* v. *Fothergill* [2] as an exceptional and anomalous rule.

In India, Macleod, J., in *Ranchhod* v. *Manmohandas* [3] and Stephen, J. in *Nabin Chandra Saha Paramanick* v. *Krishna Barana Dasi*, [4] refused to follow that rule. There is only one case brought to our notice in which it was adopted, namely, *Pitamber Sundarji* v. *Cassibai* [5], but I do not find that the effect of section 73 of the Contract Act was taken into consideration there. In Madras, in the case in *Krishna Aiyar* v. *Shamanna* [6] a vendor who failed to make out a good title was held liable in damages though it may be noted that the question of applicability of the rule laid down by *Flureau* v. *Thornhill* [1] and *Bain* v. *Fothergill* [2] was not raised or discussed. The matter however was fully considered in *Nabin Chandra Saha Paramanick* v. *Krishna Barana Dasi* [4] and *Ranchhod* v. *Manmohandas* [3].

It is then argued that since by the Hindu Law as well established by *Hunooman Persaud's* case the duty is laid on the purchaser in a case such as this to satisfy himself as to necessity for the sale, therefore the manager of a Hindu family who contracted to sell the property of the minor co-parceners is not answerable in damages. But the rule laid down in *Hunooman Persaud's* case is concerned with the question of liability of persons other than the vendor, that is, whether the acts of the manager would bind the minors, where no necessity is shown for the sale. It does not, in my opinion, affect the question of liability of the contracting party himself for damages for breach of the contract in case it turns out that he was not entitled to sell the property.

In this case it appears from Exhibit A that the vendor represented that there was necessity for selling the property in dispute. The purchaser, so far as the question lay between him and the vendor, was entitled to rely on that representation. If the representation proved to be incorrect as it eventually did, I fail to see any reason why the vendor should not be held responsible for any loss that resulted, therefrom to the buyer.

1. (1776) 2 W. Bl. 1078.
2. (1874) L. R. 7 H. L. 158.
3. (1907) I. L. R. 32 B. 165.
4. (1911) I. L. R. 38 C. 458.
5. (1886) I. L. R. 11 B. 272.
6. (1912) 23 M. L. J. 610.

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It is however to be noticed that in the proposition referred to the Full Bench no mention is made of any express representation on the part of the manager of the family.

The question is then raised whether section 55, sub-section 2 of the Transfer of Property Act applies and if it does, whether from the fact that the buyer knew that the property belonged to the family of which the vendor was only the managing member, it can be deduced that there was a "contract to the contrary." within the meaning of S. 55. S. 55 deals with rights and liabilities of buyer and seller. Sub-section 2 enacts that in the absence of a contract to the contrary, the seller shall be deemed to contract with the buyer that the interest the seller professes to transfer to the buyer subsists and that he has power to transfer the same. It is argued that this applies only to cases where the transaction is still in the executory stage. But I find nothing in the language of the section nor can I perceive any reason which would justify such a distinction. What the legislature intended apparently was that subject to any special stipulations to the contrary, certain stipulations would be presumed in every transaction of sale of immoveable property and a warranty of title on the part of the seller is one of those stipulations. It is not easy to understand how the legislature could import a stipulation of this nature in a transaction of sale without implying at the same time that it should be taken as having formed part of the contract which became perfected in the sale.

Then the mere fact that the intending purchaser knew that the property belonged to the family cannot in my opinion be said by itself to imply a contract on the part of the buyer that the seller purporting to have power to sell the property would be absolved from liability if it turned out that he had no such power. See *Arunachala Aiyar* v. *Ramasami Aiyar*[1] and *Subbaraya Reddiar* v. *Rajagopala Reddiar*[2].

For these reasons I agree with the view expressed by Seshagiri Aiyar, J., in the order of reference and would answer the question referred to us in the affirmative.

Sadasiva Aiyar, J.

Sadasiva Aiyar, J.:—In *Krishna Aiyar* v. *Shamanna*,[3] (decided by Ayling and Napier, JJ.) it was held (at page 617) that where the 1st defendant, an adult member of a Hindu family professing to be the managing member (when he was not the mana-

1. (1914) 27 M. L. J. 517. 2. (1914) M. W. N. 376,
3. (1912) 23 M. L. J. 610.

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ging member) agreed to sell the family lands including the interests of the other members, he became liable in damages to the intending purchaser if he was unable to establish his power to sell the interests of the other members. That case, which in my opinion, was a weaker case for the purchaser, was argued by able members of the Bar on both sides (Mr. K. Srinivasa Aiyangar, Mr. B. Sitarama Rao and Mr. T. Rangachariar). The 1st defendant in that case died pending the litigation, no claim for damages had been made in the plaint against him, and yet the learned Judges, when damages were claimed by the respondents' learned vakil for the first time on appeal, held that damages could and should be awarded against the 1st defendant's legal representative. (Section 16 of the Specific Relief Act mentioned at page 617 of the report is probably a clerical error for section 19 read in the light of section 29). The purchaser in that case made the contract with the eldest son (1st defendant) though the father (5th defendant who was the managing member *de jure*) was alive and yet the purchaser was awarded damages. Here, the manager *de jure* himself agreed to make the sale.

Under section 55(2) of the Transfer of Property Act." in the absence of a contract to the contrary the seller shall be deemed to contract with the buyer that " .... (the seller) " has power to transfer the interests which " he " professes to transfer to the buyer." I am unable to hold that the fact that the buyer had notice of facts which indicated that the seller had not the power which he professed to be able to transfer implies " a contract to the contrary." Napier, J. and myself in *Arunachella Aiyar* v. *Ramasami Aiyar* [1] held that the covenant in section 55, clause (2) is not excluded by the mere fact that the vendee was aware of the defect in the title. The same view was taken by Hannay, J. sitting with myself in *Thekkamannengath Raman* alias *Kochu Poduval* v. *Kakkasseri Pazhiyot Manakkal Karnavan*, [2] and by Ayling and Tyabji, JJ. in *Vellayappa Rowthen* v. *Bava Rowthen* [3]. Seshagiri Aiyar, J. has taken the same view in this case and in a prior case. I am not prepared therefore to follow the English decision in *Gas Light and Coke Co.* v. *Towse* [4] (itself differing from a prior English decision, *Mortlock* v. *Buller*, [5] especially as English courts are rather more inclined to shield

1. (1914) 27 M. L. J. 517
2. (1915) 28 M. L. J. 184.
3. (1915) 29 I. C. 747.
4. (1889) L.R. 35 Ch. D. 519.
5. (1804) 10 Ves. 292 316 : s.c. 32 E.R. 857.

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from claims for damages the vendors of lands situated in England where no system of public registry of title-deeds seems to have existed originally as in India, where the codification of the laws relating to transfers of lands seems not to be so complete and systematic as here, and where the extreme form of the doctrine of *caveat emptor* prevailed originally.

But is section 55 (2) of the Transfer of Property Act applicable to the facts of this case? The word "seller" in section 55 clause 1 as applied to the provisions of sub-clauses (a) to (d) of that section can, it appears to me, mean only a person who has contracted to sell but has not yet sold. In sub-clauses (e) and (g) it seems, however, to mean the person who has not only contracted to sell but has also actually sold. In sub-clause (f) it seems to mean the same thing where possession ought naturally to follow only on the completion of the sale, that is, in cases where a registered conveyance is necessary to convey title but it might include also a person who has only contracted to sell when the delivery of possession itself has to be made to complete the sale (as in the case of a sale of property worth less than Rs. 100 and not effected by a registered conveyance). In clause 2, (with which we are concerned), the word "seller" seems to mean the same thing as in sub-clauses (e) and (g) of clause 1, that is, a person who has actually parted with his title. [See the use in clause (2) of the words "professes to transfer" and not "contracted to transfer"]. The defendants Nos. 1 and 2 in this case not having executed any conveyance are not therefore "sellers" under clause (2) of section 55 and I think that the contention that section 55 clause (2) of the Transfer of Property Act does not apply is well founded. However, the plaintiff is entitled, in my opinion, to rely on section 73 of the Contract Act which is very wide in its terms as regards the right to compensation for breach of any kind of contract. If A chooses to contract to sell to B full ownership right in a property and breaks that contract through inability (not attributable to act of God, etc.) to convey the full title, he is legally bound to make compensation to B under S. 73. I do not think that the knowledge on the part of B that A had not the complete title which he contracted to transfer can vary the term of the contract by which A did agree to transfer a complete title; nor can such *knowledge* on the part of B itself constitute an implied *contract* to the contrary, subtracting from or rather contradicting the

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express term of the contract to convey full ownership. The contract in this case is moreover a written one (Exhibit A) and cannot under section 92 of the Evidence Act be contradicted by a contemporaneous implied (or even express) oral agreement sought to be inferred from mere knowledge of certain facts on the part of the plaintiffs.

I therefore concur in answering the question referred to us in the affirmative.

Napier, J.

Napier, J:—I agree in answering the question referred to us in the affirmative. The learned Chief Justice bases his doubt on the point on the language of section 55, sub-section 2 of the Transfer of Property Act and is inclined to think that the well known duty of a purchaser from the manager of a joint Hindu family is sufficient to indicate a "contract to the contrary," and to bring the case within the doctrine laid down by Mr. Justice Kay in the *Gas Light and Coke Co.* v. *Towse* 1. I have myself some doubt whether sub-section 2 of section 55 applies where the transaction has not gone beyond the stage of contract, the words "professes to transfer" seeming to indicate that the stage of actual transfer has been reached; and the provision for this implied contract being annexed to the interest also seeming to suggest that the interest had been created. It is not however necessary to decide the point, for I am of opinion that the doctrine in *Gas Light and Coke Co.* v. *Towse* 1 cannot be applied on the construction of the words "a contract to the contrary." It does not appear from the language used by Kay, J. that he regarded it in this light, for he appears to have treated it as a case of contract that became impossible of performance owing to circumstances in contemplation by both parties. The question then resolves itself into one under the Contract Act and unless there is any limitation of the right to recover compensation for loss or damage caused to the party who has suffered by the breach, the consequences of the section must apply. There is no doubt that according to the English law, broadly speaking, purchasers are not entitled to recover such damages for breach of an agreement to sell real property, but are limited to such expenses as they may have incurred in investigating the title, the right to recover which is stated in *Compton* v. *Bagley*,2 as not being in the nature of damages —*vide* cases quoted by Seshagiri Aiyar, J., in his judgment of

1. (1889) 35 Ch. D. 519. 2. (1891) 1 Ch. 313.

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reference; but this is admittedly an exception to the ordinary law, due as stated in *Day* v. *Singleton*, [1] to the uncertainty of making out a good title owing to the complexity of the English law of real property. This exception however has not been recognised in India—*vide Ranchhod* v. *Manmohandas*, [2] *Nabin Chandra Saha Paramanick* v. *Krishna Barana Dasi*, [3] and *Krishna Aiyar* v. *Shamanna* [4]. There still remains to consider the doctrine applied by Kay, J. It is not the doctrine of subsequent absolute impossibility which is provided for in S. 56 of the Contract Act and I know of no principle governing contracts generally which disentitles a party to recover damages for breach of a contract where it *might* only be impossible to enforce it. The doctrine, if sound, must be confined to real property in England, contracts with reference to which are treated with leniency under English law and I see no reason why we should apply *this* doctrine either in India. It has been negatived by a Bench of this court in *Arunachala Aiyar* v. *Ramasami Aiyar*, [5] in which case the Judges follow the decision of a single Judge in *Subbaraya Reddiar* v. *Rajagopala Reddiar*, [6] holding that the question of the knowledge of the purchaser does not affect the right to be indemnified under the Indian Statute Law, and in *Thekkumannengath Raman* alias *Kochu Poduval* v. *Kakkasseri Pazhiyot Manakkal Karnavan*, [7] another Bench of this court held that the question of the knowledge of a mortgagee as to the defect of title in the mortgagor is irrelevant on the same principle. I am in entire accord with this view and would hold that the law as laid down in *Gas Light and Coke Co.* v. *Towse*, [8] is not applicable to this country,

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim, Mr. Justice Spencer and Mr. Justice Srinivasa Aiyangar.

Abdul Majeeth Khan Sahib ... ... *Appellant* *

v.

C. Krishnamachariar ... ... *Respondent.*

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Mahomedan Law—Co-heirs—One of them in possession of the estate—Sale for discharging debts of deceased owner, if binding on other co-heirs or creditors of deceased.

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* O. S. A. No. 52 of 1915. 21st November 1916.

1. (1899) 2 Ch. 320.
2. (1907) I. L. R. 32 Bom. 165.
3. (1911) I. L. R. 38 Cal. 458.
4. (1912) 23 M. L. J. 610.
5. (1914) 27 M. L. J. 517.
6. (1914) I. L. R. 38 Mad. 887.
7. (1915) 28 M. L. J. 184.
8. (1889) 35 Ch. D. 519.

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When one of the co-heirs of a deceased Mahomedan, in possession of the whole estate of the deceased or of any part of it, sells property in his possession forming part of the estate for discharging the debts of the deceased, such sale is not binding on the other co-heirs or creditors of the deceased.

The *obiter dictum* in *Pathummabi* v. *Vittil Ummachabi* [1] and *Hasan Ali* v. *Mehdi Husain* [2], disapproved.

On appeal from the judgment of the Honourable Mr. Justice Bakewell, dated the 23rd day of March 1915, in the Ordinary Original Civil Jurisdiction of this Court in C. S. No. 381 of 1913.

When the case came on for hearing in the first instance the Court (the Chief Justice and Phillips, J.) made the following

ORDER OF REFERENCE TO A FULL BENCH:—

Wallis, C. J.

The Chief Justice :—This is an appeal from a judgment of Bakewell, J. in a suit brought by the Receiver appointed in a creditor's suit for the administration of the estate of a deceased Mahommedan for a declaration that a sale-deed executed by the widow of the deceased was void and not binding on the creditors and was in any event inoperative except as to the extent of the widow's one-fourth share and for possession. The learned Judge held that the sale was valid only to the extent of the widow's one-fourth share, but gave the 1st defendant her alienee a charge on the whole property for Rs. 3,432 paid by him in satisfaction of a mortgage decree against the deceased with further interest on the mortgage money till the date of payment. The learned Judge after discussing the authorities came to the conclusion as against the creditors of the deceased on whose behalf the suit was brought, the widow, even though she was in possession of all the properties of the deceased, had no authority to take upon herself the administration of the estate even to the extent of selling the suit properties to raise money to satisfy the mortgage decree in respect of these very properties which had been passed against the deceased. For the appellant it is contended that this decision is opposed to *Pathummabi* v. *Vittil Ummachabi* [1].

The whole subject is one of considerable difficulty. If a Mahommedan appoints an executor, the executor has no doubt power to sell for the discharge of the debts of the deceased, and in the absence of the executor this could have been done by the Kazi. The High Courts, as is well known, have differed as to whether a sale under a decree obtained by a creditor against one of the co-heirs in possession of property of the deceased is

1. (1902) I. L. R. 26 M. 734.
2. (1877) I.L.R. 1 A. 533.

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binding on the other co-heirs who were not parties to the suit, and the question has been answered in the affirmative both in Calcutta and Bombay. In *Davalava* v. *Bhimaji Dhondo* [1], this was limited to the case where as here one of the co-heirs was in sole *de facto* possession of the whole estate and this limitation was adopted in *Pathummubi* v. *Vittil Ummachabi* [2] where it was further held that a co-heir in possession of the whole estate could equally sell property belonging to the estate in satisfaction of debts without any suit having been instituted and decree passed against such co-heir. At the same time the Court set aside as regards the other co-heirs the sale of item 11 to the 13th defendant in consideration of a debt of Rs. 25 and a further payment of Rs. 50, apparently on the ground that it was unnecessary and improper in the circumstances though this is not expressly stated. This case was cited with approval on another point by Abdur Rahim, J., in *Ayderman Kutti* v. *Syed Ali* [3] with reference to the validity of sales by the *de facto* guardian of a minor. The learned Judge in the course of his judgment referred to the general rule relating to sales by a person professing to deal with another's property but without legal authority so to do, and observed that such sales are generally treated as *manquf* or dependent, and upheld if made of necessity or if they are manifestly beneficial, and similar considerations may possibly apply in a case like the present. Bakewell, J., was apparently of opinion that the decision in *Pathummabi* v. *Vittil Ummachabi* [2] was inapplicable where as in the present case the alienation is being questioned by the other creditors. If the balance of convenience may be regarded, I am not sure that it is for the benefit of creditors any more than of co-heirs to lay down a rigid rule that alienations can be made only by the whole body of co-heirs or in a suit to which they are parties. The question is one of importance and difficulty, and as the authorities are by no means consistent, we have decided to refer the following question to a Full Bench :—

When one of the co-heirs of a deceased Mahommedan in possession of the whole estate of the deceased or of any part of it sells property in his possession forming part of the estate for the discharge of the debts of the deceased, is such sale binding on the other co-heirs or creditors of the deceased, and, if so, to what extent ?

1. (1895) I. L. R. 20 Bom. 338. 2. (1902) I. L. R. 26 Mad. 734.
3. (1912) I. L. R. 37 Mad. 514.

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Phillips, J.

Phillips, J:—In this case the plaint property was alienated by a Mahomedan widow, who was in sole possession of the whole property belonging to her late husband in order to discharge debts due by him. No doubt the sale was voluntary, but it purports to have been made because a creditor was threatening to execute a decree against the property, and the consideration for the sale was not paid until after execution had been taken out against the suit property, the widow and the other heirs being parties to the execution petition. Two of the other heirs admit that they took no interest in the property, because deceased's debts exceeded his assets but the Receiver of the deceased's estate now questions the validity of the alienation. If the sale to the appellant had been effected by court it would apparently have been upheld both by the Calcutta and Bombay High Courts in accordance with the decisions in *Khurshetbibi* v. *Keso Vinayek* [1], *Davalava* v. *Bhimaji Dhondo* [2], *Muttyjan* v. *Ahmed Ally* [3], and *Amir Dulhin* v. *Baji Nath Singh* [4]. In Allahabad, however, it has been held by the Full Bench that when property of a Mahomedan intestate is sold in execution of a decree passed against the heirs in possession of the estate, the sale is not binding on an heir who was not a party, but in order to recover possession of his share that heir must pay the purchaser a proportionate amount of the decree debt. *Jafri Begam* v. *Amir Muhammad Khan* [5]. In this Court in *Pathumabi* v. *Vittil Ummachabi* [6], it was held that it was immaterial whether the sale was voluntary or effected by Court in execution of a decree, provided that the seller was in possession of all the effects of the deceased and the Bombay cases were followed, but in applying the law as regards sales in which only part of the consideration money was applied in discharge of a debt due by the deceased the principle laid down in *Jafri Begam* v. *Amir Muhammad Khan* [5], was followed although that case is not referred to in the judgment. In (*Jafri Begam* v. *Amir Muhammad Khan* [5], Mahmood, J. discusses fully the Mahomedan Law on the subject and criticises the rulings of the Calcutta High Court referred to above. The decisions in Bombay and Calcutta are not based on the same grounds and the view taken in *Pathummabi* v. *Vittil Ummachabi* [6], appears to be somewhat

1. (1887) I. L. R. 12 B. 101.
2. (1896) I. L. R. 20 B. 338.
3. (1882) I. L. R. 8 C. 370.
4. (1894) I. L. R. 21 C. 311.
5. (1885) I. L. R. 7 All. 822.
6. (1902) I. L. R. 26 M. 734.

different to the view of other Courts. In these circumstances I agree in making the proposed reference to a Full Bench.

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C. P. Ramaswamy Aiyar for the respondent opened the case with their Lordships' special permission:—There are two questions involved in the reference (1) a question of procedure and the other a question of substantive Mahomedan Law. The Mahomedan Law of procedure that a decree against one heir in possession of all the effects of the deceased, is binding on all if obtained after contest is inapplicable in the present day. In the eye of the Mahomedan Law, such a decree is against the deceased and not against the particular heir who is made a defendant in this suit.

[*Spencer*, *J.*—Is the question referred to us one of Mahomedan Law or of procedure ?]

That is for your Lordships to decide. Viewed as a question of procedure the Mahomedan Law cannot apply.

[*Srinivasa Aiyangar*, *J.*—The right to administer property which vests in the heirs is not governed by the Mahomedan Law.]

[*Rahim*, *J.*—The right of representation in a suit or in execution proceedings is a matter of procedure and not a question of Mahomedan Law.]

On the death of a Mahomedan each of his heirs is individually entitled to a specific portion of the property and the devolution and vesting of the property does not depend on the existence or quantum of the debts owing by the deceased.

Chandu v. *Kunhamed*[1], *Moideensa Rowthen* v. *Mahomed Kasim Rowthen*[2], *Jafri Begam* v. *Amir Muhammad Khan*[3]. There is no right of representation under the Mahomedan Law and there is no person occupying a position analogous to that of the manager of a joint Hindu family. *Azima Bibi* v. *Shamalanand*[4]. A voluntary or involuntary sale arising out of a transaction by one co-heir does not bind the other co-heirs. Reference was made to Ameer Ali, 3rd Edition, Vol. 2, pp. 54, 58; Wilson's Digest, p. 215; Tyabji on Mahomedan Law, pp. 516, 517, Macnaghten, p. 171;

1. (1891) I. L. R. 14 M. 324, 326.
2. (1915) 28 I. C. 895.
3. (1885) I. L. R. 7 A. 822
4. (1912) I.L. R. 40 C. 378, 385.

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Hedaya, pp. 347, 349, *Hamir Singh* v. *Musammat Zakia* [1], *Jafri Begam* v. *Amir Muhammad Khan* [2], *Dallu Mal* v. *Hari Das* [3], *Bazayet Hossein* v. *Dooli Chund* [4], *Land Mortgage Bank Ltd.* v. *Bidyadhari Dasi* [5], *Muttyjan* v. *Ahmed Ally* [6], *Bussenteram Marwary* v. *Kamaluddin Ahmed* [7], *Amir Dulhin* v. *Baji Nath Singh* [8], *Ramcharan Sanyal* v. *Anukul Chandra Acharjya* [9], *Khurshetbibi* v. *Keso Vinayek* [10], *Davalava* v. *Bhimaji Dhondo* [11], *Moosabhai* v. *Yacoobbhai* [12], *Pirthipal Singh* v. *Husaini Jan* [13], *Muhammad Ablahaberd Khan* v. *Muhammad Ismail Khan* [14], *Dulla Mall* v. *Hari Das* [3], *Pathumabi* v. *Vittil Ummachabi* [15], *Ayderman Kutti* v. *Syed Ali* [16], *Abdul Khader* v. *Chidambaram Chettiar* [17].

C. Venkatasubbaramiyah for the appellant relied upon *Pathummabi* v. *Vittil Ummachabi* [15], Williams on Executors, 10th Edition, Vol. I, p. 195. Tyabji, p. 519; Ameer Ali, Vol. I, p. 698; *Bussenteram Marwary* v. *Kamaluddin Ahmed* [7], *Pestonji M. Mody* v. *The Queen Insurance Company* [18], *Gnanambal Ammal* v. *Veerasami Chetty* [19].

The Court expressed the following

Abdur Rahim, J.

Opinion :—*Abdur Rahim, J*:—The question referred to us is in these words: When one of the co-heirs of a deceased Muhammadan, in possession of the whole estate of the deceased or of any part of it, sells property in his possession forming part of the estate for discharging the debts of the deceased, is such sale binding on the other co-heirs or creditors of the deceased and, if so, to what extent? The answer must be in the negative.

On the death of a Muhammadan, the inheritance vests in his heirs according to their respective shares, although in the administration of the estate the funeral expenses, debts and legacies must be paid first and it is only the residue that is available for distribution among the heirs. It is not correct to say that the devolution of the estate on the heirs does not take place or is postponed until the funeral expenses and the debts and legacies

1. (1875) I. L. R. 1 A. 57.
2. (1885) I. L. R. 7 A. 822.
3. (1901) I. L. R. 23 A. 263.
4. (1878) I. L. R. 4 C. 402, 406.
5. (1879) 7 C. L. R. 460.
6. (1882) I. L. R. 8 C. 370, 373.
7. (1885) I. L. R. 11 C. 421.
8. (1894) I. L. R. 21 C. 311.
9. (1906) I. L. R. 34 C. 65.
10. (1887) I. L. R. 12 B. 101.
11. (1895) I. L. R. 20 B. 338, 346.
12. (1904) I. L. R. 29 B. 273.
13. (1882) I. L. R. 4 A. 361.
14. (1888) I. L. R. 10 A. 289, 319, 342.
15. (1902) I. L. R. 26 M. 734.
16. (1912) I. L. R. 37 M. 514.
17. (1908) I. L. R. 32 M. 276, 279.
18. (1900) I. L. R. 25 B. 332.
19. (1915) 29 M. L. J. 698.

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have been paid. This is evident from the following facts : if an heir designated by the law dies after the death of the propositus his share descends on his own heirs and does not lapse to the general estate. Each heir is entitled to the income that has accrued since the testator's death in proportion to his share and he can transfer his share by sale or gift subject, it may be, as to the latter form of disposition to such restrictions as are imposed by the doctrine of Musha.

The theory of Muhammedan jurisprudence, on which the right of succession and inheritance is based, is that even after death, the deceased's rights in properties still inhere in him, to the extent necessary for meeting the funeral charges and the legal obligations and liabilities incurred in his lifetime and also for carrying out his wishes, as expressed in his last will and testament, within the limits laid down by the law. A deceased person is classed among persons of defective capacity and his rights and obligations are considered not merely with reference to matters pertaining to this world but also with respect to his spiritual concerns. The payment of his funeral expenses and debts is described as his last need. And as for testamentary bequests, it is stated that, according to strict juristic theory, they should not be lawfull at all but have been sanctioned in order that the testator might make up for his shortcomings in life by making gifts to deserving objects.

It is argued that, as soon as a man is seized with 'death illness,' (*i. e.*, illness which results in his death), the right of succession of his relatives comes into existence, although it remains in an inchoate state that is, in the nature of a *spes successiones* until death actually takes place, and the heirs entitled to succession are not ascertained until then. It is upon this theory that the right to bequeath by will is treated as a concession to the deceased and is limited to one-third of his possessions. The result is, on the death of a person his estate is to be divided in this way, one portion for the deceased himself equivalent to so much of the estate as is necessary and sufficient for meeting his funeral expenses, debts, obligations and bequests the last not exceeding one-third of the estate and what remains is to be distributed among the heirs according to their respective shares. Funeral expenses, debts and legacies are given preference because they are allowed by virtue of the rights of the deceased.

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As far back as 1878, the Judicial Committee in *Bazayet Hossein* v. *Dooli Chund*[1], held that an heir-at-law was entitled to alienate his share in spite of the fact that there were debts of the deceased still outstanding and it would not have been possible to hold this if the inheritance did not devolve on the heir on the death of the propositus. Mr. Justice Mahmood in *Jafri Begam* v. *Amir Muhammad Khan*[2], has fully discussed the question and I do not think it would be of any use to add anything more to his reasoning. As regards the nature of the tenure of the co-heirs' shares, the heirs of a deceased Muhammadan take their shares in severalty, their rights being analogous, to those of tenants-in-common, and not of members of a Joint Hindu Family. (See *Abdul Khader v. Chidambaram Chettiyar*[3].

There cannot be the slightest doubt therefore upon the principles of Muhammadan law and also upon the authorities that one heir has no right to deal with the shares of the other heirs. In the Muhammadan system such a tenure of property is called *Shirkat* which literally means "participation" and, in law, 'joint rights', and which is translated as 'partnership' by Mr. Hamilton in his translation of the Hedāya.

The definition of *Shirkat* as given by him is, "*Shirkat*, in its primitive sense, signifies the conjunction of two or more estates, in such a manner, that one of them is not distinguishable from the other. The term *Shirkat*, however, is extended to contracts, although there be no actual conjunction of estates, because a contract is the cause of such conjunction. In the language of the law it signifies the union of two or more persons in one concern." (See Grady, Book XIV, p. 217.) This definition, however, must be read with what follows and, so reading, it will be clear that *Shirkat* is a generic term of law and applies both to joint ownership and to contracts of partnership. The former is called *Shirkat-ul-Milk* which is translated by Mr. Hamilton as "partnership by the right of property"; and the latter, which is partnership proper in the sense of the English law, is called *Shirkat-ul-Akd*. In *Shirkat-ul-Milk*, the ownership acquired is either "optional" or "compulsive," to use the terms of Mr. Hamilton, and in the latter category are included the rights of co-heirs. With respect to such rights it is laid down," In this

1. (1878) I. L. R. 4 C. 402. 2. (1885) I. L. R. 7 All. 822.
3. (1908) I. L. R. 32 M. 276.

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species of partnership, (*i. e.*, the rights of two persons inheriting one property) therefore, it is not lawful for one partner to perform any act with respect to the other's share, without his permission each being as a stranger with respect to the other's share. It is, however, lawful for either partner (*i. e.*, one of the heirs) to sell his own share to the other partner (*i. e.*, the co-heir) in all the cases here stated :—and he may also sell his share to others, without his partners' consent,' excepting in certain cases with which we are not concerned.

This is absolutely clear authority in proof of the position that one heir has no authority, in law, to deal with the shares of his co-heirs. In face of it it is not necessary to refer to other original text books. It is stated, however, in *Pathummaubi* v. *Vittil Ummachabi* [1] that, " if the creditor of the deceased can seek his relief against one of several co-heirs in a case where all the effects of the deceased are in the hands of that heir, it can make no difference whether the heir meets the demand by a *bona fide* voluntary sale, or the property is brought to sale in execution of a decree obtained against him." To the same effect is a decision of the Allahabad High Court in *Hasan Ali* v. *Mehdi Hussain* [2]. The statement in *Pathummabi* v. *Vittil Ummachabi* [1] was purely by way of obiter dictum and, with all respect to the learned Judges, they failed to bear in mind that, the provision of the Muhammadan law, that a decree against one heir in possession of all the effects of the deceased, is binding on all if obtained after contest, is part of the processual law of that system and is not based on the ground that a single heir, if he happens to be in possession of the estate of the deceased, represents the rest of the heirs for the purposes of administration generally. The ground on which a decree against one of the heirs, in such circumstances, is treated as *res judicata* is, as stated in the books, that the decree in such cases is, in law, against the deceased and not against the particular heir who is made defendant in the suit.

In the Hedaya the matter is discussed in the chapter relating to the duties of the Kazzee and in some other text books in the chapter dealing with claims, in which chapters the rules of procedure of the Muhammadan system are mostly laid down. In dealing with the question whether one of the heirs obtains a decree for the recovery of the property of the deceased in possession

1. (1902) I. L. R. 26 M. 734. 2. (1877) I. L. R. 1 A. p. 533.

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of a third person more than his share in that property should be made over to him in execution of the decree, it is stated that all the three Doctors, that is, Abu Haneefa and his two disciples, agree that the decree enures not only in favour of the heir who actually is the plaintiff but also of the heir who did not join on account of absence from the country though there is a difference of opinion as to whether the decree holder shall be given possession of more than his share. This is how the principle is enunciated in the Hedaya (Grady, p. 349 "for anyone of the heirs of a deceased person stands as litigant on the part of all the others with respect to anything due to, or by the deceased, whether it be debt or substance ; since the decree of the Kazee, in such case, is in reality either in favour of or against a deceased; and any one of the heirs may stand as his representative with *respect to such decree.*" The qualifying words "with respect to such decree" which I have italicised are a material part of the proposition and, negative, by implication, the suggestion that, apart from a decree of Court, a single heir represents the entire estate of the deceased and can deal with the shares of the co-heirs without their consent. In other text books of Muhammadan law, such as Bahrurraiq and Alimajullah, the same proposition is laid down under the heading of 'Claims'. Nowhere have I found any general statement that, apart from representation in suits, one heir is entitled by his acts to bind the shares of the others. The dictum to the contrary, therefore, in *Pathummabi* v. *Vittil Ummachabi* [1], and the decision in *Hasan Ali* v. *Mehdi Husain* [2], seem to be without sufficient authority and inconsistent with clear statements of the law in books of authority.

There are a number of rulings, especially of the Calcuttr High Court in which the rule of Muhammedan law as to one heir representing the other co-heirs in suits, has been adopted. (See *Assamathem Nessa Bibee* v. *Roy Lutchmeeput Singh*[3] followed by *Muttyjan* v. *Ahmed Ally* [4], *Bussenteram Marwary* v. *Kamaluddin Ahmed* [5] and *Amir Dulhin* v. *Baij Nath Singh* [6]. In the Allahabad High Court, on the other hand, the decision of the Full Bench in *Jafri Begum* v. *Amir Muhammad Khan* [7], where it was held, dissenting from *Assamathem Nessa Bibee* v. *Roy Lutchmeeput Singh* [3], that this question is not governed by the

1. (1902) I.L. R. 26 M. 734.
2. (1877) I. L. R. 1 A. p. 533.
3. (1878) I. L. R. 4 C. 142.
4. (1882) I. L. R. 8. C. 370,
5. (1885) I. L. R. 11 C. 421.
6. (1894) I. L. R. 21. C. 311.
7. (1885) I. L. R. 7 A. 822

Muhammadan law, but by the Civil Procedure Code, has been followed in the later rulings of that Court (See *Dalla Mal* v. *Hari Das* [1]. In Bombay (*Khurshet Bibi* v. *Kaso Vinayek* [2], the view taken by the Calcutta High Court on this point has been adopted by the learned Judges, though proceeding to a considerable extent on the analogy of the Hindu Law.

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It is not necessary for us to pronounce any definite opinion upon this class of cases which deal with the question how far a decree against one of the heirs of a deceased Muhammadan binds the others and under what circumstances.

So far as voluntary alienations are concerned, which alone form the subject-matter of reference, the Muhammadan law is clear that one of the heirs of a deceased person is not competent to bind the other heirs by his acts.

Spencer, J.

Spencer, J. :—I agree with the judgment of Mr. Justice Abdur Rahim just now pronounced.

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J. :—I agree. In the absence of any right in one of the heirs to represent the co-heirs, one of several co-heirs can only deal with his or her interest in the ancestor's property inherited by them. My learned brother has shown that there is nothing in the Muhammadan law giving such a right to one of the co-heirs who may happen to be in actual possession of the whole of the ancestor's estate; such possession, it must be remembered, is presumably on behalf of all the co-heirs. He is not constituted the representative of the deceased and cannot administer his property even for the limited purpose of paying off his debts. In *Khiarajmal v. Daim*, [3] Lord Davey referring to a sale by one of the heirs of a Muhammadan for discharging the debt due by the ancestor said "*prima facie* his conveyance would pass only his share" See. p. 37. Representation in a suit may conceivably stand on a different footing for as stated by their Lordships in the same judgment at page 35 "The Indian Courts have exercised a wide discretion in allowing the estate of a deceased debtor to be represented by one member of the family, and in refusing to disturb judicial sales on the mere ground that some members of the family, who were minors, were not made parties to the proceedings, if it appears that there was a debt justly due from the deceased, and no prejudice is shown to the absent

1. (1901) I. L. R. 23 A. 263. 2. (1887) I. L. R. 12 B. 101.
3. (1904) L. R. 32. I. A. 23=I. L. R. 32 C. 29 6.

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minors. But these are usually cases where the person named as defendant is, *de facto*, manager of a Hindu family property, or has the assets out of which the decree is to be satisfied under his control ;" and they applied this principle in that very case to the estate of Nabibaksh. However, that is not the question here.

A. V. V.

PRIVY COUNCIL.

Present :—Lord Parker of Waddington, Lord Sumner, Sir John Edge and Sir Lawrence Jenkins.

[On Appeal from the High Court of Judicature at Fort William.]

Deonandan Prashad ... *Appellant**

v.

Janki Singh and others ... *Respondents.*

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Trusts Act, (II. of 1882) *S.* 90 *—Sale for arrears of Revenue, Act II of* 1859 *—Default by co-sharer leading to sale of estate—Purchase by defaulting co-sharer —Such purchase to be held for the benefit of all the co-sharers—Standard of reciprocal conduct to be exacted from co-sharers—Form of the decree—Duty of Counsel in* ex parte *cases.*

Where a co-sharer in an estate caused the sale of that estate by not paying his own proportion of Government revenue, and bought the estate himself.

Held, that he took his purchase in trust for all the co-sharers.

The relative position of co-sharers in respect of the payment of revenue demands from each such measure of candid dealing and good faith as will ensure that a sharer is not tempted to make a deliberate default with a view to ousting his co-sharers and appropriating to himself their commen property.

Where an appeal is heard *ex parte* it is the duty of Counsel to bring to the notice of the Board adverse as well as favourable authorities.

Form of the decree considered.

Appeal from a decree of the Calcutta High Court, dated August 18, 1910, reversing a decree of the Additional Subordinate Judge of Monghyr.

The facts are sufficeintly stated in their Lordships' judgment. Towzi. No. 5298 of Zilla Monghyr was assessed to revenue at Rs. 256. A 4 anna pattidar opened a separate account; the 12 annas share remained ijmali (joint). Of this 12 annas share 3 annas belonged to some of the plaintiffs (respondents) who mortgaged their share with possession to Appellant, the latter covenanting to pay Rs. 51-8-0 for revenue, cessess &c. Towards the instalment of revenue due in June 1905 appellant

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* 2 and 3 December 1916.

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paid Rs. 3-6-0 in excess. In paying later instalments the other co-sharers took advantage of this excess payment, so that nothing remained to the credit of the 12 annas share. Thereafter Appellant paid Rs. 9 only instead of Rs. 12 towards the Kist (instalment) of September 1906 and as a result the whole ijmali share was put up for sale and purchased by Appellant much below its value.

In 1907 the mortgagors of the 3 annas and the remaining co-sharers in the 12 annas share brought the present suit to set aside the sale or in the alternative for a re-conveyance of the property, alleging that the sale was due to appellant's default and that it was brought about by his fraud. The Subordinate Judge held that there was no fraud on Appellant's part; that all the notices required by law were duly served, and that the sale was good and valid. He dismissed the suit. On Appeal the High Court (Holmwood and Chatterjee, JJ.) reversed his decision. They held that the other share holders had no notice of the sale proceedings, and that the present appellant's position was such that he could not hold his purchase for his own benefit either as against his mortgagors or as against the remaining co-sharers. They further held that the sale and purchase were fraudulent, and that the appellant could not be allowed to retain "his ill-gotten bargain". They therefore ordered that on plaintiffs paying into Court Rs. 425 (the amount of purchase-money) with interest at 6% from date of sale within three months, the defendant should convey the property to them.

Hence this appeal.

De Gruyther K.C., with him *Dube* for Appellant:—The High Court could not find fraud against the Appellant, as no particulars of fraud were pleaded. The use of general words imputing fraud is ineffectual; *Gunga Narayan* v. *Tinack Ram* [1].

The sale was caused by the default not of defendants but of plaintiffs themselves. They were not entitled to utilise the Rs. 3-6-0 overpaid by defendant in June 1905.

If credit be given to defendant for that amount, there was no default on his part in September 1906. The defendant has paid all the revenue which as usufructuary mortgagee he contracted to pay.

1. (1888) L. R. 15 I. A. 119 : I. L. R. 15 C. 533.

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Even assuming that Appellant as one of the co-owners intentionally defaulted, that would not constitute fraud. A co-sharer has no duty to pay up his quota of the Government revenue for the purpose of protecting other co-sharers, and even if the sale be brought about by his default, this does not prevent his purchasing for himself. *Doorga Singh* v. *Sheo Prasad Singh*, 1.

S. 90 of the Indian Trusts Act, (Act II of 1882) has no application, it only applies where a co-owner or mortgagee gains an advantage by availing himself of his position as such.

Every co-sharer ought to look after his own interest and there is nothing to prevent one co-sharer buying the property sold for default of payment by another : on the contrary, this is expressly permitted by S. 53 of Act XI of 1859.

The Respondents did not appear.

Their Lordships judgment was delivered (December 7, 1916) by

Sir Lawrence Jenkins.

Sir Lawrence Jenkins :—This suit relates to a 12-annas share of Mouzah Tikarampur, Pergunnah Monghyr, being Towzi No. 5298. The property was offered for sale in the Collectorate of Monghyr, for the recovery of arrears of revenue, under the provisions of Act XI of 1859 on the 25th March, 1907, and was bought for the defendant, Babu Deonandan Prashad, a minor, in the name of Bunwari Lal. Before the sale it belonged as to 9 annas to the plaintiffs 7 to 16, and as to the remaining 3 annas to the plaintiffs 17 to 20, subject to a usufructuary mortgage of these 3 annas for the benefit of Deonandan, and to transfers of parts to the plaintiffs 1 to 6.

The suit, which impugns the sale, failed in the Court of first instance, but on appeal the plaintiffs' claim was upheld, and a decree was passed on the 18th August, 1910, that Deonandan, through his certificated guardian, do convey the property to the plaintiffs.

From this decree Deonandan has preferred this appeal. At one time the property was part of a larger estate, but there was a separation of shares under Act XI of 1859, and thereby the 12-annas share now in suit became subject to a Government revenue of 192 Rupees, payable in four annual instalments.

Though the liability to the Government was, continued to be joint, yet, as between themselves, it was distributed among the

1. (1889) I. L. R. 16 Cal 194.

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several co-owners in proportion to their respective shares. Thus the amount payable in respect of 3-annas share was a fourth, that is to say, 9 rupees in June, 12 rupees in September, 12 rupees in January, and 15 rupees in March. The mortgage of the 3-annas share for the benefit of Deonandan was executed on the 23rd December, 1904, and it was thereby stipulated that the mortgagee should, by remaining in possession from 1312 F. up to the repayment to him of the entire debt thereby secured, collect and realise the rent of the mortgaged Mouzah, estimated as not exceeding 150 rupees, and should pay out of it 51 Rupees 8 annas into the Collectorate for revenue and other public demands.

In June 1905, 9 rupees became payable by the mortgagee, but 12 rupees 6 annas was paid. The reason of this excess payment does not appear. At the end of the four following instalments there were no arrears.

But of the instalment payable in September 1906, only 9 rupees instead of 12 rupees was paid on behalf of the mortgagee. As the other co-owners paid their several aliquot shares and no more, there was after giving credit for advance payments from previous instalments, a balance still owing of 2 rupees 10 annas. This became in due course an arrear of revenue as defined by the Act, and it was to recover this arrear that the property was sold by the Collector.

The arrear, therefore, which occasioned the sale, was due to the insufficient payment made in respect of the 3 annas share, and none the less was this the result of the default of those interested in that share, because in June 1905 an excess payment of 3 rupees 6 annas had been made. This excess had long been absorbed, and had ceased to be an excess credit in the Towzi ledger. This, in effect, is the view expressed in the judgment under appeal, and it is made a basis of the High Court's decision in the plaintiffs' favour. The learned Judges as a further and distinct ground of decision find that there was fraud, and the language used by the High Court, read literally, might be understood to attribute personal fraud to the minor, Deonandan. But, in view of his age, this can hardly have been intended. In any case their Lordships acquit him of any personal misconduct in relation to the default or sale. He was, however, represented by agents, and when the position created by them is regarded as a

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whole, it leads to the conclusion that the Government revenue was intentionally allowed by them to fall into arrear with a view to the property being put up for sale and bought on behalf of the minor. If this be the true view, as their Lordships hold, then, however free from personal blame the minor may have been, he cannot profit by his agents' deliberate default committed in breach of the terms of the mortgage. As against his mortgagor therefore, the mortgagee cannot be allowed to hold for himself the advantage gained by the default for which his agents are responsible. Nor, in their Lordship's opinion, can he be permitted to hold for himself this advantage to the prejudice of the co-owners. For this purpose the mortgagor and mortgagee may be identified; they together represented the 3-annas share, and theirs was the obligation to pay their quota of the revenue. Equally in relation to the co-owners was the default designed with a view to a subsequent sale and to a purchase on the minor's behalf, and the advantage gained by this scheme must, in like manner, be held for the benefit of the co-owners, who are not shown to have been aware of the default or sale, or to have disentitled themselves to this equitable relief. They had contributed their proper quota to this September instalment, and it cannot be supposed that had they known of the default or the peril to their interests they would have allowed a valuable property, worth, it is said, not less than 8,000 Rupees, to be sold away for the failure to pay 2 Rupees 10 annas.

In estimating the conduct of the parties it is not without significance that, while the co-owners of the other shares paid in full their contribution to the succeeding January instalment, nothing was paid on account of the 3-annas share.

Their Lordships have not overlooked the decision in *Doorga Singh* v. *Sheo Prashad Singh* [1], which lends support to the appellant's contention as against the co-owners; but it is apparent from the judgment under appeal that this decision has not stood unquestioned. And this also appears from the judgment in *Faizar Rahman* v. *Maimuna Khatun* [2]. This case was not cited in the course of the argument, as the respondents were not represented, but their Lordships wish it be distinctly understood that where an appeal is heard *ex parte* it is the duty of Counsel to bring to the notice of the Board adverse as well as favourable authorities.

1. (1889) I. L. R. 16, C. 194.

2. (1911) 17 C. W. N. 1233.

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The decision in *Doorga Singh's* case applied too lax a standard of reciprocal conduct in holding that fraud in its strictest sense, such fraud as would support a common law action of deceit was the test by which to judge these transactions. It failed to pay due regard to the relative position of co-owners in respect of the payment of revenue and to the need of demanding from each such measure of candid dealing and good faith as would ensure that a sharer would not be tempted to make a deliberate default with a view to ousting his co-sharers and appropriating to himself their common property. Here Deonandan, through his representatives, had a duty to perform, which was inconsistent with his becoming a purchaser of the property in the way he did, therefore his title cannot operate to the exclusion of the co-owners.

It is no answer to say that the Act contemplates a purchase by a sharer; the sale stands, but in the circumstances the transaction is in effect nothing more than payment of an arrear of revenue enuring for the benefit of all. But this gives a right to contribution, so that it must be a term of granting the plaintiff's equitable relief that they contribute to the expenses properly incurred by or for Deonandan in the purchase of the property.

The amount to be contributed has been fixed by the High Court's decree at 425 rupees with interest at 6 per cent. per annum within three months. As no exception has been taken to this, either by way of cross-appeal or otherwise, it may be accepted, but the time for payment must be fixed by the Subordinate Judge after notice to the parties. The declaration in the decree that the sale and purchase is invalid is misconceived as a description of the legal position, and in its place should be substituted a declaration that the property purchased must be held for the benefit of the plaintiffs and the first defendant according to their several interests at the date of the sale, subject to the repayment of 425 rupees, and interest on that sum at the rate of 6 per cent. per annum from the date of the sale, and there should be a direction for a conveyance as decreed by the High Court on payment of that amount on or before a date to be fixed by the Subordinate Judge. With this variation the decree of the High Court should, in their Lordships' opinion, be affirmed, and they will humbly advise His Majesty to this effect.

Solicitors for Appellant :—*Watkins and Hunter.*
Solicitors for Respondents :—*W. W. Box & Co.*

A. P. P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Napier.

Sellamani ... *Appellant* * (*Prisoner*).

Sellamani *In re.*

Criminal Tribes Act, 1911—S. 23, *Sub-sec.* (1) *cl.* (*a*)—"*Second conviction*"—*Cl.* (*b*) "*third conviction*"—*Meaning.*

The words "second conviction" in cl. (a) of Sub-sec. (1) of S. 23 of the Criminal Tribes Act, 1911, signify a first conviction for a scheduled offence after the coming into force of the Act following upon either one or many convictions of scheduled offences prior to the Act and the words "a third conviction" of cl. (b) signify a second conviction so following.

The words "second conviction" in cl. (a) do not mean a second conviction after the notification.

Appeal against the order of the Court of Sessions of the South Arcot Division in Case No. 52 of the Calendar for 1915.

The Public Prosecutor for the Government.

The Court delivered the following

Judgment:—The conviction is by a Jury and there is no misdirection.

As regards sentence we observe that the case appears to fall under clause (a) and not under clause (b) of S. 23 (1) of the Criminal Tribes Act 1911. Accused's last conviction was in 1907 so that his present conviction is his first after the enactment of Act 3 of 1911 and the notification of his tribe as a Criminal Tribe. S. 23 (1) is not altogether easy of interpretation; but we think that the phrase second conviction has reference to the words in the sentence "is hereafter convicted" and not to the earlier words "having been convicted" as the Sessions Judge has read them. The section will thus read, "whoever, having been convicted, is hereafter convicted, shall on a second conviction be punished with imprisonment for a term of not less than seven years"; and we must take the words "second conviction" to signify a first conviction for a scheduled offence after the coming into force of the Act following upon either one or many convictions of scheduled offences prior to the act; and a third conviction of clause (b) to signify a second conviction so following.

The construction put on the words by the Sessions Judge would entail a sentence of transportation for life on a member

* Crl. Appeal No. 21 of 1916. 15th March 1916.

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who had prior to the notification been twice convicted, for the first offence committed by him after the act. We cannot think that the legislature intended such a drastic provision. We notice a third alternative reading namely that on a second conviction means second after the notification but we think that this cannot be accepted. The legislature could not have intended to omit reference to the case of a first conviction after the notification. If it had wished that no special punishment should be attached to such a conviction it would have used some such words as shall on such conviction be punished with the punishment provided by the Penal Code but on the next conviction etc. It is also extremely improbable that the legislature would have intended to omit such fresh convictions from the mischief of the act.

On the view we have taken the Sessions Judge was not bound as regards sentence by the limitations imposed by Clause (b) and should have dealt with it under Clause (a) and on the merits of the case we think the ends of justice will be met by a sentence of ten years rigorous imprisonment to which the sentence is hereby commuted, the conviction being affirmed.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH].

Present:—Sir John Wallis, *Chief Justice*, Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Aiyangar.

Sai Sikandar Rowther ... *Petitioner* (Defendant.)*

v.

Ghouse Mohidin Marakayar and others... *Respondents (Plaintiffs).*

F. B.

Sai Sikandar Rowther *v.* Ghouse Mohidin Marakayar.

Presidency Small Cause Courts Act XV of 1882 *Ss.* 37, 38—*Powers of the Small Cause Courts under S.* 38—*Jurisdiction of the Full Bench of the Small Cause Court to decide questions of fact.*

A Full Bench of the Small Cause Court sitting under S. 38 of the Presidency Small Cause Courts Act has no jurisdiction to decide questions of fact generally; nor has it jurisdiction to decide questions of fact, when those questions of fact first arise before it in consequence of its finding on a question of law.

Petition under S. 115 of Act V of 1908 and S. 15 of the Charter Act praying the High Court to revise the decree of the

* C. R. P. No. 521 of 1915. 16th December 1916.

F. B.

Sai Sikandar Rowther v. Ghouse Mohidin Marakayar.

Oldfield, J.

Full Bench of the Court of Small Causes, Madras in Full Bench Application No. 38 of 1915 (Suit No. 19422 of 1914).

The Court (Oldfield and Sadasiva Aiyar, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH:—

Oldfield, J.—This litigation began in the Court of Small Causes as a suit against defendant for the balance of price of paddy purchased from Ibrahim Sa, represented by plaintiffs. It was originally dismissed by the Chief Judge on the ground that Ibrahim Sa's partners in a firm at Penang should have been joined as parties, as the sale to defendant was by the firm. There was then an appeal to the Full Bench of the Court, which resulted in a decision that plaintiffs were entitled to sue alone. That decision we are asked to revise on the ground that the learned judges exercised a jurisdiction they did not possess in dealing on appeal with questions of fact. The first issue before us is therefore whether the Full Bench decision turned on a finding or findings of fact or law or mixed law and fact. In the circumstances of the case, which will be referred to, it is worth noticing that the question is not whether the findings are right or wrong, since mistakes in fact or law, not affecting the exercise of jurisdiction would not justify interference in revision. It may also be pointed out that we are concerned with the considerations actually presented to the learned judges and dealt with in their judgments, not with others, on which it may appear to us probable that a decision would have been reached more easily.

It is necessary to state this at the outset owing to the course taken by the proceedings. Although a sale was alleged in the plaint by Ibrahim Sa to defendant without a hint that anything but an actual and explicit contract was relied on, it soon became clear that the only contract of that kind, to which defendant had been a party, was not with Ibraim Sa and that the two became vendor and purchaser, if at all, in virtue of some implication from their subsequent relations. The paddy in question was consigned by Ibrahim Sa's firm at Penang to certain Chetties at Madras with a hundi drawn in their favour on Ibrahim Sa. The Penang firm was to recover (as it actually did) from the Chetties or their representatives at Penang, the former recovering from Ibrahim Sa. Ibrahim Sa however in circumstances not stated did not pay them

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and defendant obtained the paddy on promising to pay the Chetties for it. Now, if that had been the purchase in question, and it is the only transaction outwardly resembling one referred to in evidence, defendant ostensibly bought either from the Penang firm or the Chetties, and could be sued only by one or other of them. For Ibrahim Sa had (so far as appears) no express contract with defendant, the evidence that he negotiated the transaction being immaterial and the evidence that he was his surety having been rejected. The learned Chief Judge no doubt suggested as an alternative ground of decision in plaintiffs' favour that Ibrahim Sa could and did sue as agent of the Penang firm with reference to S. 230, Indian Contract Act. But, as that is not the main ground of his decision or the ground of his colleagues' and as it is inconsistent with the plaintiffs' grounds of appeal to the Full Bench, it is unnecessary to consider it further or to say more than that if Ibrahim Sa had been agent for a foreign firm his agency would have ceased at his death and no decree could have been passed in favour of his legal representatives as if the agency had descended to them.

The argument which the learned Chief Judge and his colleagues accepted was based on Ibrahim Sa's subsequent conduct in paying or promising to pay the Chetties (the findings in the Judgments are not clear) in discharge of the hundi in their hands the balance, which defendant had failed to pay them as purchase money for the paddy, and on a finding that Ibrahim Sathus became the owner of the portion of the paddy, for which defendant had not paid, and resold it to him, acting throughout in his individual capacity and not as a member of the firm. In dealing with this argument the learned Chief Judge said " Ibrahim Sa had to pay the balance to the Chetties and retire the hundi. The suit is for the money, which is also the balance purchase money due for the paddy. It is now pointed out that Ex. A shows that defendant treated Ibrahim Sa as the contracting party to whom the purchase money was due". So also another learned judge. "The position was that the Penang firm despatched the paddy to Ibrahim Sa with the obligation imposed on him to pay the amount of the hundi. The effect of Ibrahim Sa having accepted that obligation is to convert the paddy into his property."

Are the questions thus decided questions of law or of fact? The answer is in my opinion that two questions were decided, one of the former and the other of the latter description. The

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trial judge had dealt with the case as a whole and, distinguishing it from any case based on Ibrahim Sa's discharge of the hundi had decided for defendant without reference to the alleged acquisition of ownership by the former and resale by him to the latter. First then the Full Bench dealt with that acquisition and identified the sale referred to in the plaint with the resale. No doubt the judgments do not refer to this construction of the facts as based on any legal principle; and it is possible, though (as I observed above) we are not concerned with the possibility in revision, that no principle, which would justify it, can be established. But we cannot treat the conclusion as merely arbitrary; and the only alternative is that Ibrahim Sa was treated by the Full Bench as a purchaser, who resold, in consequence of the application to his conduct of some rule or supposed rule of law. Next having decided, as a point of law, what Ibrahim Sa did, the Full Bench considered whether he did it in his individual capacity or as a partner. Here the case is different, because there is no necessity to supplement the implication from the facts by the application of any legal principle in order to understand the decision in favour of the former alternative. It depended, as the judgments show, on no presumption or estoppel, but directly on the evidence as to Ibrahim Sa's position, the relations between the parties and especially on the inference from defendant's letters; and in connection with this part of the case no question of law is referred to in the judgment or is shown to have arisen. The conclusion therefore is that the Full Bench, when it decided that Ibrahim Sa acted in his individual capacity, dealt with a question of fact.

We have next to consider whether it had jurisdiction to do so under S. 38, Act XV of 1882, or could only state the question of fact, which in its opinion arose, and order a new trial with reference to it. In *Sadasook Gambir Chand* v. *Kannayya* [1] the majority of a Bench of this court held, not generally that a Full Bench of the Small Cause Court could not decide a question of fact, which first arose before them, but that it could not interfere with the decision of the trial judge, unless it was such as no reasonable man could have come to; that is, unless there was practically no evidence to support it. Best, J. held however that the powers of the Full Bench were unrestricted. In *Srinivasa Charlu* v. *Balaji Rau* [2] the decision, again with reference to a

1. (1895) I. L. R. 19 M. 96. 2. (1896) I. L. R. 21 M. 282.

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question of fact dealt with by the trial Judge, was that no appeal on a question of fact could be entertained. Recently however these authorities have been the subject of adverse criticism in *Ramasamy Aiyar* v. *The Madras Times Limited* [1], in which my learned brother took part. If the matter were *res integra,* I should be inclined to concur in the conclusion, that the Full Bench is entitled generally to deal with questions of fact; and so much conceded, I should hold that, when, as here, the question of fact arises before it in consequence of its finding on the question of law, it must determine in the exercise of its discretion whether it will itself decide the former on the evidence on record or whether it will order a new trial, one important consideration being that the parties have or, as appears to have been the case in the instance before us, have not fresh evidence to adduce.

I would therefore refer for the decision of a Full Bench the questions

(1) Whether a Full Bench of the Small Cause Court, sitting under S. 38, Act XV of 1882, has jurisdiction to decide questions of fact generally.

(2) Whether it has jurisdiction to do so, when the question of fact first arises before it, in consequence of its finding on another question of fact or law.

Sadasiva Aiyar, J.—I agree.

C. Krishnamachariar for *V. C. Seshachariar,* Vakil for the Petitioner.

V.V. Srinivasa Aiyangar, for the Respondents.

The Full Bench expressed the following

Wallis, C. J.

Opinion:—*Wallis, C. J.*;—We think that *Sadasook Gambir Chund* v. *Kannayya* [2], and *Srinivasa Charlu* v. *Balaji Rau* [3], were rightly decided, and should in any case be allowed as they are decisions on a point of practice which have now stood for many years, and their reversal must seriously affect the settled practice of the court. In Calcutta, Sale, J. was clearly of the same opinion in *Sasoon* v. *Hurrey Das Bhukut* [4], and it has since been treated as settled law. *Johan Smidt* v. *Ram Prasad* [5]. Dealing with the question in the reference, we think that in the cases to which we have been referred in Bombay and in this

1. (1915) 30 M. L. J. 207
2. (1895) I. L. R. 19 M. 96.
3. (1896) I. L. R. 21 M. 232.
4. (1896) I. L. R. 24 C. 455.
5. (1911) I. L. R. 38 C. 425.

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Court *Behram* v. *Ardeshir* [1], *Bapuji* v. *Dastur*,[2] and *V. Ramasamy Aiyar* v. *The Madras Times Limited* [3] attention was not sufficiently called to the corresponding changes in the County Courts Act from the first of which the provision as to new trials were taken. As is well known the Presidency Towns Small Cause Courts are summary tribunals established in 1850 to relieve the Supreme Courts in the Presidency Towns, and were largely modelled on the County Courts which had recently been established in England under 9 and 10 Vict. C. 95 to relieve the Common Law Courts at Westminster, many of the principal sections in the Indian Act IX of 1850 being taken verbatim from the English Act, including that which made the judgments of the courts final and conclusive subject to the power of granting new trial. S. 89 of the English Act provided as follows :—" Every order and judgment of any court held under the Act, except as hereinafter provided, shall be final and conclusive between the parties but the Judge shall have power to non-suit the plaintiff in every case in which satisfactory proof shall not be given to him entitling either the plaintiff or the defendant to the judgment of the court, and shall also in every case whatever have the power, if he shall think fit, to order a new trial to be had upon such terms as he shall think reasonable, and in the meantime to stay proceedings. "

The section was re-enacted verbatim as S. 53, Act IX of 1850 merely substituting judges for judge with the consequential alterations. The legislature which in express terms made the judgment of these summary courts final and conclusive did not in conferring the power to grant a new trial intend to give a right of appeal on the facts, but rather to enable the court before whom the application came to interfere with such findings in the same way and on the same grounds as the Courts of Common Law who had no power to find facts for themselves were accustomed to interfere with the findings of juries by setting them aside and directing a new trial. See *Murataghv*. *Barry* [4], *Clarke* v. *West Ham Corporation* [5]. At the time the procedure in Common Law Courts of Queen's Bench, Common Pleas and Exchequer was still much as it is described in Blackstone, Book III, Chapters 23 and 24. After the verdict wherever found had been returned into the court in which the action was brought, the court gave the appropriate

1. (1903) I. L. R. 27 B. 563.
2. (1906) 8 Bom. L. R. 678.
3. (1915) 30 M. L. J. 207.
4. (1890) 24 Q. B. D. 632.
5. (1914) 2 K. B. 448.

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judgment on the facts so found unless there was something to vitiate the verdict, in which case all the court could do was to set it aside and order a new trial, as they had no power to find the facts for themselves. It is we think quite clear that the legislature did not intend to confer any larger powers of questioning the findings of the judges of these courts. There was some difficulty about a County Court Judge granting a new trial in a case tried before himself, and though the power has never been taken away the difficulty was met by S. 14 of the Act of 1850, 13 and 14 Vict. C. 61 which gave a limited right of appeal from his judgments to any of the Courts of Common Law, "as to the determination or decision of the said court in point of law, or upon the admission or rejection of any evidence" and provided that on the appeal the court "may order a new trial on such terms as it may think fit, *or may order judgment to be entered for either party*, as the case may be, and make such order with respect to the costs of the said appeal as such court may think proper." The Appellate Court was thus only entitled to interfere on the ground of error of law or wrongful admission or rejection of evidence and could not find the facts for itself, but could either order a new trial or enter judgment if the case allowed it without a fresh finding of facts. There was not the same difficulty in the case of the Small Cause Courts as in the case of County Court Judges, as the application for a new trial could be taken by the Full Court or a Bench thereof but S. 53 of Act IX of 1850 was defective in so far as it only empowered the court on such application to order a new trial and not to give the appropriate judgment when no fresh finding was necessary, *Robinson* v. *Fawcett and Firth* [1], a decision on the identical section in the County Courts Act. It was only natural that this defect should be supplied when the present Presidency Towns Small Cause Courts Act was passed in 1882 by amending the old S. 53, renumbered as S. 37, and empowering the court either to order a new trial to be held or to "alter, set aside or reverse the decree or order upon such term as it thinks reasonably." There is really no ground for the contention that by this amendment the legislature intended to enable the Court to entertain appeals on questions of fact. In *Cousins* v. *Lombard Deposit Bank* [2], in consequence of an alteration in the procedure prescribed in bringing appeals from the County

1. (1901) 2 K. B. 325. 2. (1876) I Ex. D. 404.

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Courts before the High Court, the contention was raised that the High Court had by virtue of the amendment been invested with the power of hearing of appeals on the facts, but the contention was emphatically rejected by Cleasby, B and Grove and Field, JJ. "I cannot think" Grove, J. observed "that by 38 and 39 Vict. C. 50, S. 6, the legislature contemplated an extension of the right to appeal in suits arising within what used to be called the common law jurisdiction of the County Courts. The change would have been great in principle, and if the legislature had intended to introduce it, clear language would have been employed. If an appeal were allowed upon questions of fact the result would be that, either as a matter of right, or by leave of the Judge of the County Court, this Court, or even a higher tribunal, might be compelled to determine the proper inference to be drawn from conflicting facts. The object of the legislature in establishing cheap and expeditious tribunals would be defeated." These observations are fully applicable to the present case. Thousands of cases are decided by the Small Cause Court every year, and if the right of appeal were freely exercised, not only would the summary nature of the tribunal be destroyed, but the work of the court would be blocked. Again, if the legislature had intended to allow appeals on the facts, some record of the evidence would certainly have been prescribed. As already pointed out full effect may be given to the alteration introduced into S. 37 in 1882 without construing it as introducing so revolutionary a change.

The matter is, if anything, clearer as regards the further alterations introduced by Act I of 1895. In 1882 in consequence of some dissatisfaction which had been felt as regards the summary disposal of suits involving considerable sums, an extraordinary provision was introduced by S. 38 giving a right of rehearing of the whole case by the High Court after judgment had been given in the Small Cause Court, where the value was over Rs. 1,000, and the chapter was accordingly headed "New trials and rehearings." In 1895 S. 38 which provided this anamalous procedure was repealed, liberty being reserved in another part of the Act to remove cases involving sums of more than Rs. 1,000, in the High Court before trial. Apparently to save renumbering, the old S. 37 was then split up into two, omitting the word "but" and the heading of the chapter was altered and

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the word "Appeals" substituted for "Rehearings." The term appeals is applied in the English Act of 1850 already mentioned to applications to the High Court for a new trial or reversal of the judgment of the County Court on grounds of law, and though its use was perhaps not unlikely in this country to lead to misconception, its insertion in the heading of the chapter cannot be said to have altered the effect of the sections which have been already construed.

We must accordingly answer the first question in the negative.

As regards the second question, whether the Full Bench of the Small Cause Court has jurisdiction to decide questions of fact generally when the question of fact first arises before it in consequence of its finding on another question of fact, or law, it has already been shown that the Full Bench has no power to decide questions of fact. When S. 14 of the County Courts Act, 1850 was re-enacted as S. 122 of the County Courts Act, 1888, an amendment was introduced empowering the High Court hearing the appeal to draw any inference as to fact. No such power has yet been conferred upon the Court of Small Causes, and we must accordingly answer the second question in the negative.

Abdur Rahim, J:—I agree.

Srinivasa Aiyangar, J:—I agree.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

Present:—Mr. Justice Abdur Rahim, Mr. Justice Spencer, and Mr. Justice Srinivasa Aiyangar.

Putta Kannayya Chetti and others ... *Appellants** (*Defendants*).

v.

Rudrabhatla Venkata Narasayya ... *Respondent* (*Plaintiff*).

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Madras Civil Courts Act (III *of* 1873) *Ss.* 12 *and* 13—*Decree beyond pecuniary jurisdiction, if and when can be passed—Decree for more than Rs.* 5,000, *by District Munsif, in a suit for accounts—Appeal from decree, lies only to District Court.*

Per *Ayling* and *Srinivasa Iyengar*, *JJ*:

In suits for accounts or mesne profits, the Court can award such sum as it finds due to the plaintiff though such sum is above the pecuniary limits of its jurisdiction.

* A. No. 117 of 1915. 31st October 1916.

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Arogya Udayan v. *Appachi Rowthan* [1], *Ratnasawmy Chetti* v. *Ratnammal* [2] *Madho Das* v. *Ramji Patak* [3], *Sudarshan Das Shastri* v. *Ram Prasad* [4], referred to.

Golap Singh v. *Indra Coomar Hazra* [5], not followed.

Held by the Full Bench, that where a suit for accounts is instituted in a District Munsif's Court, the plaintiff valuing the subject-matter of the suit at an amount within the pecuniary jurisdiction of the District Munsif and a decree is passed for more than Rs. 5,000, the appeal from that decree lies to the District Court and not to the High Court.

Ayyalu Naidu v. *Ramasami Naidu*, (1916) C. M. A. 131 of 15, *Chathanath Kunhunni Menon* [6], overruled

Ijjatula Bhugan v. *Chandra Mohan Banerjee* [7], dissented from.

Appeal against the decree of the Court of the District Munsif of Chodavaram in Original Suit No. 141 of 1913.

L. A. Govindaraghava Aiyar for *B. N. Sarma* for Appellants.

V. Ramesam for Respondent.

The Court (Ayling and Srinivasa Aiyangar, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH:

A preliminary objection is taken to the hearing of this appeal on the ground that the appeal should have been preferred to the District Court and not to this Court. The suit was for dissolution of partnership and for accounts, and the plaintiff valued the subject-matter of the suit at Rs. 2,000, as he was entitled to do and instituted it in the Court of the District Munsif, Chodavaram, who after taking accounts found that the plaintiff was entitled to Rs, 5,577-7-1 and gave him a decree for that sum and interest. The appeal is from that decree and the appellants contend that as the decree was over Rs. 5,000, they are entitled to appeal to this Court. They evidently do not object to the District Munsif passing a decree for more than Rs. 2,500, at any rate that is not a ground of appeal.

The question depends on the proper construction of S. 13 of the Madras Civil Courts Act. The appeal lies to this Court if the amount or value of the subject-matter of the suit, not of the appeal, exceeds Rs. 5.000. S. 12 of the same Act which prescribes the original jurisdiction of Civil Courts confers on District Munsif's jurisdiction over all original civil suits of which 'the amount or value of the subject-matter does not exceed Rs. 2,500, and presumably the expressions are used in the same sense in both the sections.

1. (1902) I. L. R. 25 M. 543.
2. (1914) 27 M. L. J. 388.
3. (1894) I. L. R. 16 A. 286.
4. (1910) I. L. R. 33 A. 97.
5. (1909) 12 C. W. N. 493.
6. (1893) 4 M. L. J. 43.
7. (1907) I. L. R. 34 C. 954.

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The Act itself contains no rules and prescribes no method of arriving at the amount or value of the subject-matter of the suit except where the subject-matter is land, house or garden in which case the value is to be fixed in the manner prescribed by the Court Fees Act (S. 14). The Suits Valuation Act of 1887 extended the principle of S. 14 of the Civil Courts Act, and S. 8 enacted that except in certain classes of suits, with which we are not now concerned, in all others where court-fees are payable *ad valorem* the value as determinable for the computation of court-fees and the value for the purposes of jurisdiction shall be the same. In the present case *ad valorem* court-fees are payable and to fix the value of the subject-matter of the suit for the purposes of jurisdiction we have to turn to the Court Fees Act. Under that Act, the Court-fee is assessed in suits for accounts—this is a suit for accounts—on the amount at which the relief sought is valued in the plaint. Under O. VII, Rule 2, where the plaintiff sues for an amount which will be found due to him on taking unsettled accounts he must state *approximately* the amount sued for. These provisions make it clear that the plaintiff has a right to value the relief he claims in suits for accounts which value can only be approximate as very often he may not be in a position to fix with any precision the amount which finally he may be entitled to. There is another class of suits, *viz.*, those for recovery of mesne profits where also the plaintiff may not be in a position to know precisely what amount he is entitled to. In this case also the plaintiff is entitled to claim a certain amount approximately and is bound to pay court-fees on that amount in the first instance. See S. 7, cl. 1 of the Court Fees Act. Whether a suit for mesne profits is a suit for accounts or damages is immaterial for the present purpose. In these two classes of suits the plaintiff can obtain a decree for more money than what he has approximately claimed in the plaint, and as the basis of assessment for court-fees is the amount which he claims, and in cases where he gets more than what he approximately claims, what he in fact gets, he is obliged to pay for the extra amount which he has obtained; and this obligation is enforced by certain penalties: S. 11 of the Court Fees Act. It is to be observed that the levy of the extra fee does not necessitate any amendment in the valuation of the suit and does not affect the validity of the adjudication. In certain cases, which after the changes introduced in the new Code of Civil Procedure cannot now happen

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the suit itself may be dismissed for non-payment of the extra court-fee.

In these classes of cases, it is obviously inconvenient, if not impossible, to change the value according to the actual amount found to be due, for the amount may be varied in appeal which again may be varied on further appeal till you reach a final adjudication in a court of last resort which may not be *res judicata* on a re-trial of the same matter in a court competent to take cognisance of the suit according to that adjudication.

The court which has jurisdiction to try the original suit must then depend on the amount or value of the subject-matter of the suit as fixed by the plaintiff and amidst the conflict of opinion on other matters there is none on this. The further question is, can the amount or value of the subject-matter change, or be changed by the plaintiff, so as to affect (*a*) the jurisdiction of the trial court (*b*) the power of the court to give reliefs in accordanee with its adjudication even though the value of such reliefs exceed the pecuniary limits of its jurisdiction (*c*) the forum of appeal.

The value of the suit in cases where such value is or is assumed to be capable of precise determination, though fixed by the plaintiff in the first instance,—the plaint must contain a statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of court-fees so far as the case admits—if disputed, is determined by the court, and that determination which is preliminary to the adjudication of the suit determines the court which has jurisdiction to try the suit. The value for the purposes of court-fees and jurisdiction may or may not be the same. [Compare the several sections of the Suits Valuation Act]. In cases where it is difficult or impossible to estimate in money value the benefit which a plaintiff may get if he succeeds, the Court-fee is a fixed fee, but for purposes of jurisdiction, the value of the property or right involved in the suit would be the test; if there are rules framed under section 9 of the Suits Valuation Act, the value of the subject-matter must be determined in accordance with those rules. In the 3rd class of cases, as in the present, though the amount or value is capable of precise determination, it can be arrived at only after an adjudication of the merits of the claim, and it is impossible to have a preliminary investigation into the value of the suit for the purpose of determining jurisdiction. For example, take the case of

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the plaintiff who sues in ejectmet and claims future mesne profits in addition; the amount which he may be entitled to, may go on increasing with the increase in the duration of the pendency of the suit; and how is one to fix the value first for the purpose of jurisdiction before the trial of the suit is begun while the value may go on increasing during the trial. Again take a suit for accounts, and suppose the suit is begun in a District Munsif's Court the plaintiff giving an approximate value, say, of Rs. 1,000. The District Munsif after trial finds that what the plaintiff is entitled to is Rs. 3,000. If he returns the plaint to be presented to the Court of a Subordinate Judge, that court may find that the plaintiff is entitled to only Rs. 1,000 and may in its turn return the plaint to be presented to the District Munsif. In this class of cases, therefore, of necessity, the plaintiff is allowed to fix his own valuation; but in all the three classes alike when once the valuation is fixed, there is no provision of law which allows the plaintiff to change or to alter that valuation at his pleasure. Further the value of the subject-matter of the suit must be its value at the institution of the suit (Order II rule 3 clause 2): for instance in a suit for recovery of ryotwary land, the fact that Government increased the assessment during the pendency of the suit cannot change the value so as to affect the jurisdiction of the court. This of course does not affect the power of the court to allow an amendment of the plaint at the request of the plaintiff. On principle then the value of the subject-matter of the suit for the purposes of jurisdiction must be its value when the plaint is filed whether such value is determined by rules made for that purpose which in case of dispute may be settled by the court as in the first two classes, or is fixed by the plaintiff without any one having a right to dispute that valuation as in the last class; and that value cannot change or be changed except by amendment as aforesaid so as to affect the jurisdiction of the trial court.

In *Bhupendra Kumar Chakravarthi* v. *Purna Chandra Bose* [1], a contrary view appears to have been taken. There the plaintiff valued the land at Rs. 886-8-0 past mesne profits at Rs. 200 and the future mesne profits were not valued at all as in fact they could not be. The Munsif passed a decree for possession, which was confirmed in appeal and second appeal and

1. (1910) I. L.R. 43 C. 660.

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directed the assessment of mesne profits in execution as he was entitled to do under the old Code. The plaintiff put forward a claim for future mesne profits far exceeding the pecuniary jurisdiction of the District Munsif in whose Court he had instituted the suit for recovery of possession of land with past and future mesne profits. Mookerjee and Teunon, JJ. held that the plaint in so far as it embodied a claim for future profits must be returned to the plaintiff to be presented to the proper court. We venture to doubt whether the procedure under the Code allows a return of portions of the plaint or one of several claims contained in it. Though as pointed out in that judgment, no cause of action for future mesne profits arose on the date of the institution of the suit, and has not therefore to be valued in the plaint, the court which is seized of jurisdiction of the suit to recover possession of the land is under statutory authority empowered to grant future mesne profits also. There is nothing in the Code of Civil Procedure which in any way limits the power of the court to award the amount found due by it, and as we construe S. 12 of the Civil Courts Act, that section does not limit the relief to be given by a court to an amount which is within the limits of its pecuniary jurisdiction but only determines the court which has jurisdiction over particular causes. However that may be, the provisions of the Code of Civil Procedure contemplate the return of plaints to be presented to the proper court—and the way it is done is by physically handing over the plaint to the plaintiff—and do not contemplate an adjudication of portions of the claim or one of the claims set up in the same plaint and a return of the other portion or other claims contained in the same plaint for adjudication in another court. Though a plaint may contain several causes of action, there is only one suit and the jurisdiction of the court as regards the suit depends on the amount or value of the aggregate subject-matters at the date of instituting the suit. No doubt for certain purposes several causes of action joined in one plaint may be treated as separate suits (see for example S. 4 of the Limitation Act) but for the purposes of Order VII Rule 10 of the Code of Civil Procedure corresponding to S. 57 of the old Code the aggregate of the claims put forward in the plaint must be treated as one suit; nor can we say that the amount of future mesne profits reserved for ascertainment is the subject of a fresh suit instituted after the decree for possession, for that decree besides ordering delivery of

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possession declares that the plaintiff is entitled to future mesne profits in the suit already instituted and reserves only the ascertainment of the amount to further proceedings in the same suit. Again if the claim for future mesne profits is to be considered as a fresh suit when is it supposed to be instituted ; is it after obtaining possession in execution of the decree for possession, when the plaintiff is in a position to know the exact period for which he is entitled to profits, or at the time when he asks the court to ascertain the future mesne profits which he apparently can do after the preliminary decree ; is the pecuniary jurisdiction of the court to depend on the amount of the claim for future profits taken by itself as if a fresh suit had been instituted for the amount, or has the value of the land and the amount of past profits, if any already adjudicated upon, also to be taken as part of the value of the suit ; what if the plaintiff does not state what amount he claims for future mesne profits but simply requires the Court to continue the suit and ascertain mesne profits and award him the amount due. There may also be a difficulty as to limitation. A different view was taken in *Rameswar Mahton* v. *Dilu Mahton* [1]. Though the actual decision in that case was justified in the latter case, the learned judges practically dissented from the ratio of the decision. In a still later case in the same court, *Panchuram Tekadar* v. *Kinoo Haldar*, [2] the decision in *Rameswar Mahton* v. *Dilu Mahton*, [1] was followed though the ground on which that decision was supported in *Bhupendra Kumar Chakravarthi* v. *Purna Chandra Bose*,[3] was not available. In *Panchuram Tekadur* v. *Kinoo Haldar*,[2] the decision in *Bhupendra Kumar Chakravarthi* v. *Purna Chandra Bose*[3] was distinguished on grounds which, with all respect, are not clear to us. We are, therefore, of opinion that in every case when the court is seized of jurisdiction it cannot and does not lose it by any change in the value of the subject-matter of the suit after the institution of the suit or by the precise ascertainment of its value in cases which do not admit of such ascertainment at the time of institution, except when the plaint is allowed to be amended ; and that is not really an exception.

On the same principle we think the court can award such sum as it finds due to the plaintiff although such sum is above the pecuniary limits of its jurisdiction. This can happen only in

1. (1894) I. L. R 21 Cal. 550. 2. (1913) I. L. R. 40 Cal. 56. 3. (1910) I. L. R 43 Cal. 650.

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suits for accounts or mesne profits, as in all other cases the plaintiff without amending his plaint cannot get more than what he claims ; even in suits for accounts or mesne profits, the plaintiff does not really get more than what he asks, for the relief prayed for in those suits is not for a particular sum, but to whatever sum the plaintiff is found ultimately entitled to, and the amount fixed approximately is for the purpose of determining the court which has jurisdiction to try the suit. The decision of this Court in *Arogya Udayan* v. *Appachi Rowthan* [1], is we think conclusive on this question. In *Golap Singh* v. *Indra Coomar Hazra* [2], Mookerjee and Carnduff, JJ., held that in a suit for accounts the court can only award a sum up to the limits of its pecuniary jurisdiction ; and if the court finds that the plaintiff is entitled to more, it cannot even return the plaint to be presented to the proper court. The plaintiff it seems must be deemed in law to have given up any excess sum when he chose to bring his suit in a court of limited pecuniary jurisdiction ; and *Arogya Udayan* v. *Appachi Rowthan* [1], was distinguished on the ground that there though the learned Judges held that the Munsif had jurisdiction to proceed with the further trial of the suit, they did not say the Munsif can pass a decree for the amount he finds due. The opening sentences of the judgment in *Arogya Udayan* v. *Appachi Rowthan* however show that that distinction is untenable and the judgment read as a whole is clear that the learned Judges who decided that case never imagined any such distinction. The matter was put quite clearly by Sir John Edge and Banerji, JJ. in *Madho Das* v. *Ramji Patak*, [3] which has been followed in a very recent case in that court *Sudarshan Das Shastri* v. *Ram Prasad* [4] where Stanley, C. J. and Banerji, J. dissented from the decision of the Calcutta Court in *Golap Singh* v. *Indra Coomar Hazra* [2] and followed their previous decision in *Madho Das* v. *Ramji Patak* [3]. The principle was succinctly stated in *Ratnasawmy Chetty* v. *Ratnammal* [5] to which one of us was a party.

The remaining point is as to the forum of appeal. We think that the same simple rule should be applied, *viz.*, that the amount or value of the subject-matter as fixed in the plaint should determine the court to which the appeal lies. It is to be observed that the words "amount or value of the subject-matter of the

1. (1902) I.L.R. 25 M. 543.
2. (1909) 13 C. W. N. 498.
3. (1894) I. L. R. 16 All. 286.
4. (1910) I. L. R. 33 All. 97.
5. (1914) 27 M. L. J. 388.

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suit" occur both in sections 12 and 13 of the Civil Courts Act and the words should be given the same meaning in both the sections in the absence of any indication either from the context or otherwise that they were used in different senses; in this case, apart from the general rule of construction, it will be clear that the words are used in the same sense when it is remembered that the value determined both the trial Court, and the Court of appeal the intention of the legislature obviously being that the value when once ascertained and settled should remain the same for both purposes. The rule is not only simple and capable of easy application to all cases but is also right on principle. As pointed out by that eminent Judge Sir V. Bashyam Aiyangar in *Krishnamachariar* v. *Mangammal*, [1] the theory of an appeal is that the suit is continued in the Court of Appeal and reheard there. In the Court Fees Act a special provision is made for the levying of additional fees on the plaint when the suit comes before the Court of Appeal—observe the language—if that Court finds that the suit has been undervalued. If the *value of the suit* does not change while it is in the first Court, there is no reason to hold that that value changes when the same suit is taken to the Court of Appeal. The fact that the valuation in certain cases is *approximate*—that is the word used in the Code of Civil Procedure, not nominal as said in certain decisions—is no reason for holding that when it is precisely ascertained, that must be the value of the suit, for whatever may have been the position before the Suits Valuation Act was enacted, by virtue of S. 8 of that Act whenever *ad valorem* court-fees are payable the value of the suit as computed for that purpose is to be the value of the suit for the purposes of jurisdiction; and no distinction is made between original and appellate jurisdiction. In certain cases and—the present is one of such—for the purposes of court-fees the plaintiff has a right to fix his own valuation of the suit in the plaint, and he is also *bound* to state it in his plaint. Though additional court-fees are payable under S. 11 that does not as already stated change the value of the subject-matter of the suit for the purposes of jurisdiction. The mistake lies in supposing that the amount or value of the subject-matter of the suit, is its real or a market value. It is the value fixed according to the mode prescribed by the statute though in the absence of any

1. (1903) I. L. R. 26 Mad. 91.

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statutory provision as in S. 14 of the Civil Courts Act, or the Suits Valuation Act, the real or the market value of the subject-matter will have to be ascertained as in the case for instance, of appeals to His Majesty-in-Council. This was the view taken in *Madho Das* v. *Ramji Patak*[1] (where Sir John Edge and Banerji, JJ. pointed out the anomalies and difficulties in holding otherwise) and in *Nagendra Nath* v. *Rusik Chandra* [2].

But we must admit that there is a considerable body of judicial opinion against our view which we now propose to examine. It has been held that in suits for accounts, or mesne profits, where the court is at liberty to award a larger sum than what is fixed in the plaint as the approximate amount to which the plaintiff is entitled, the amount determined by the First Court as the amount due to the plaintiff should be taken as the value of the subject-matter of the suit, that is one view, or the amount so determined and accepted by the plaintiff should be the value, that is another. The former appears to have been the view generally entertained in the Calcutta High Court though Mookerji, J., formulated the latter in his judgment in the Full Bench decision in *Ijjatula Bhuyan* v. *Chandra Mohan Banerjee* [3]. See *Mohini Mohan Das* v. *Satis Chandra Roy*, [4] *Gulab Khan* v. *Abdul Wahab Khan*, [5] *Ijjatula Bhuyan* v. *Chandra Mohan Banerjee* [3]. This view of Mookerjee, J., has been accepted by the Allahabad High Court in *Goswami Sri Raman Lalji Maharaj* v. *Bohra Desraj* [6]. The former view has been adversely criticised in the judgment of Mookerji, J., and not much more need be said of it. Why the finding of the first Court should determine the value is not apparent—the legislature has not said so. In *Mohini Mohan Das* v. *Satis Chandra Roy*[4] which is the first of the cases in which this doctrine was propounded the learned judges say the precise value of the suit is ascertained when the first Court has ascertained it. That with all respect does not appear to be correct, either as a matter of law or as a question of fact, so long as there is an appeal against the decree ascertaining the amount. In *Gulab Khan* v. *Abdul Wahab Khan* [5] the reason stated is where the plaintiff fixes definitively a sum, that is the valuation, but if he fixes tentatively, then the first Court's adjudication; and this decision was followed by the majority of the judges

1. (1896) I. L. R. 16 All. 286.
2. (1901) 6 C. W. N. 846.
3. (1907) I. L. R. 34 Cal. 958.
4. (1890) I. L. R. 17 Cal. 704.
5. (1904) I. L. R. 31 Cal. page 395
6. (1910) I. L. R. 32 All. 222.

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in *Ijjatula Bhuyan* v. *Chandra Mohan Banerjee* [1]. As we have already pointed out, there is no distinction made in the valuation of the suit between definite or tentative valuation in any of the relevant Acts. In *Ibrahimji Issaji* v. *Bejanji Jamsedji,* [2] and *Nilmony Singh* v. *Jagabandhu Roy,* [3] the view later on adopted by Mookerjee, J., appears to have been taken and in *Goswami Sri Raman Lalji* v. *Bohra Desraj,* [4] the learned Judges distinguished the earlier case of *Madho Das* v. *Ramji Patak,* [5] in their own Court, on the ground that in that case there was no acceptance by the plaintiff of the amount ascertained by the trial Court.

The difficulty of accepting this position as correct is equally great. What happens if plaintiff does not accept the amount ascertained to be due; how is he to signify his acceptance; till his acceptance what is to be the position of the defendant if he wants to appeal? As far as we have been able to examine the cases, no satisfactory answer is obtainable to any of these questions. Let us take a concrete case. Suppose a suit for accounts is instituted in a Subordinate Court with unlimited pecuniary jurisdiction and the plaintiff values his claim at Rs. 3,000. The Court gives him Rs. 4,000. Neither the plaintiff nor the defendant is satisfied; the plaintiff wants Rs. 6,000 and the defendant says nothing is due. To what court should defendant appeal and to what court the plaintiff? Suppose defendant wants to appeal; how is he to ascertain if the plaintiff accepts the valuation or not? Suppose defendant appeals first, his appeal must obviously be to the District Judge. After that plaintiff appeals claiming Rs. 3,000 more; should his appeal be to the High Court? If it is to the High Court, does the District Court lose jurisdiction over the defendant's appeal; and if before the plaintiff appeals the District Court decides the defendant's appeal in his favour is that adjudication void as being without jurisdiction? Suppose the plaintiff after appealing to the High Court and after the defendant's appeal is taken up to the High Court withdraws his appeal; has the defendant's appeal to be sent back? Can the plaintiff file a Memorandum of Objection in the defendant's appeal in the District Court claiming the extra three thousand? Is it the principle that till there is an ascertainment of the amount due by the first Court accepted by the plaintiff, his original valuation is the test as was apparently

1. (1907) I. L. R. 34 C. 958. 2. (1895) I. L. R. 20 Bom. 265.
3. (1896) I. L. R. 23 C. 536 4. (1910) I. L. R. 34 A. 232.
5. (1894) I. L. R. 16 All 286.

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held in *Nilmony Singh* v. *Jagabandhu Roy*, [1]. If it is, the difficulty does not cease, for if the court dismisses the plaintiff's suit after taking accounts the plaintiff if he appeals to the District Court cannot, on the principle laid down in *Bhupendra Kumar Chakravarty* v. *Purna Chandra Bose* [2] get more than Rs. 5,000 the limit of that Court's appellate jurisdiction. The result of accepting any of these positions would be that the value of the subject-matter of a suit is a shifting quantity and varies from the trial Court to the Court of Appeal and varies even for purposes of appeal according as the appellant is the plaintiff or the defendant. If again this interpretation is correct, the forum of appeal may change in appeals from decrees or orders of the same court in the same suit, for example, in a suit for accounts the appeal from the preliminary decree dismissing the suit or ordering accounts may lie to one court, while an appeal from the final decree may lie to a different court—that is just what happened in *Gulab Khan* v. *Abdul Wahab Khan* [3]—a result certainly, not contemplated by S. 13 of the Civil Courts Act.

In most of the cases in which the question had arisen, the original suit was instituted in a Subordinate Court of unlimited pecuniary jurisdiction, and it was easy, after the amount was ascertained by the first Court and after the plaintiff had paid the additional court-fee under S. 11 of the Court Fees Act, to treat the case as one of amendment of the plaint, in which case the amendment takes effect as from the date of the institution of the suit, and the amended value of the suit for purposes of jurisdiction both of the trial Court and the Court of Appeal. Some such assumption appears to have been made in *Ibrahimgi Issaji* v. *Bejanji Jamsedji* [4] and *Chethanath Madhavi Amma* v. *Chethanath Kunhunni Menon*, [5]. But there is no warrant for this assumption, and as observed in *Arogya Udayan* v. *Appachi Rowthan* [6], the plaintiff has not, and should not be allowed, to amend the valuation, as the result of allowing the plaintiff to amend the valuation may be to shift the jurisdiction from one court to another at the option of the plaintiff.

Hitherto we have assumed that the suit was instituted in a court of unlimited jurisdiction, when it is possible to change the valuation for purposes of appeal without in any way affecting the

1. (1893) I. L. R. 23 C. 536.
2. (1911) I. L. R. 48 C. 650.
3. (1904) I. L. R. 31 C. 365.
4. (1895) I. L. R. 20 B. 265.
5. (1898) 4 M. L. J. 48.
6. (1902) I. L. R. 25 M. 548.

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jurisdiction of the trial Court. The application of this principle of valuation whether the principle be that adopted by Mookerjee, J., or that adopted by the other learned Judges who took part in the decision in the Full Bench Case, becomes still more difficult if not impossible in cases where the suit was instituted in a court of limited pecuniary jurisdiction. Under the Bengal, North-Western Provinces and Assam Civil Courts Act,—and similar provisions are to be found in the Civil Courts Act of the other provinces—an appeal from a decree of the District Munsif lies only to the District Court, and the District Court has jurisdiction to entertain appeals only from decrees in suits where the value of the suit does not exceed Rs. 5,000. If in a suit for accounts or *mesne profits* instituted in a District Munsif's Court, the plaintiff valuing the claim at an amount within the pecuniary limits of that Court, that Court gives a decree for more than Rs. 5,000, where would the appeal lie? In *Golap Singh* v. *Indra Coomar* [1], a Bench of the Calcutta High Court solved the problem, as already stated, by holding that the Munsif cannot pass a decree for more than the amount of his pecuniary jurisdiction. This has not been accepted by the Allahabad High Court, and that Court holds that the Munsif can pass a decree for any amount, *Jagannath Prasad* v. *Rustom Ali* [2]; but yet they accept the decision in *Ijjatula Bhuyan* v. *Chandra Mohan Banerjee* [3], see *Goswami Sri Raman Lalji Maharaj* v. *Bohra Desraj* [4], as to the valuation for determining the forum of appeal. How in the case supposed would the Allahabad High Court, which has to apply the same Civil Courts Act, decide the question? The precise question is raised in this case, for the suit was instituted in a Munsif's Court and a decree of that Court awards to the plaintiff a sum over Rs. 5,000 which, if the decision of this Court in *Arogya Udayan* v. *Appachi Rowthan* [5], is correct, the District Munsif was entitled to do. Mr. Govindaraghava Aiyar argued that our legislature was wiser and anticipated the difficulty and provided an appeal or at least contemplated an appeal to the High Court from the decree of the District Munsif, and drew our attention to the language of S. 13 which in the second clause enacts,—omitting the words not now material,—that "appeals from the decrees of Subordinate Judges and District Munsifs shall lie to the District Court except when

1. (1909) 13 C. W. N 493.
2. (1910) I. L. R. 33 A. 17.
3. (1907) I. L. R. 34 C. 958.
4. (1910) I. L. R. 32 A 222.
5. (1902) I. L. R. 25 M. 543.

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the amount or subject-matter of the suit exceeds Rs. 5,000 in which case the appeal shall lie to the High Court." There is, we think, no warrant for this construction. It is to be observed that the assumption, if there is one, is that the District Munsif may have original jurisdiction to pass a decree in a suit the amount or value of the subject-matter of which is above Rs. 5,000 but as S. 12 of the same Act is quite clear and confines the original jurisdiction of the District Munsif to suits of which the value does not exceed Rs. 2,500, the assumption is unwarranted. Reading both Ss. 12 and 13 together there can be no doubt that appeals from decrees of District Munsifs lie only to the District Court. We think this affords almost conclusive proof that our interpretation of the words "The amount or value of the subject-matter of the suit" is the correct one.

It was said that our construction leads also to some anomalies; it enables the District Munsif to try and decree suits and the District Court to try appeals whose *real value* may be much larger than the limits of their pecuniary jurisdiction as fixed by the Statute. If this is an anomaly it is not peculiar to suits for accounts or mesne profits or any other such class of suits where the plaintiff is given the right to fix his own valuation; for even in cases of so called determinate valuation, the valuation as fixed by rules framed for that purpose may not be, and in a considerable class of important suits as for example suits for land is not, the *real value* of the subject-matter of the suit. A striking instance of such a case is the case of *Bhupendra Kumar* v. *Purna Chandra Bose* [1] already referred. The original suit was for land and mesne profits. The land was valued at Rs. 886-6-0 and was decreed by the Munsif; there was an appeal to the Subordinate Judge, and a second appeal to the High Court. The plaintiff claimed profits of the very land for ten years and in execution of that decree fixed the approximate amount at Rs. 75,510 and the High Court held the Munsif was not entitled to try this claim in execution of his own decree. If the District Munsif can try a suit for the land and give a decree for it though the real value of that land must have been must larger than the amount claimed for mesne profits, if such claim was at least approximately correct, we are unable to perceive any anomaly in our holding that the approximate valuation fixed by the plaintiff, where that

1. (1910) I. L. R. 43 C. 650.

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is one of the modes prescribed by the Legislature for the valuation of the suit, should govern jurisdiction in the trial of the suit in all its stages whether in the Court of first instance or in an Appellate Court. One other instance is sufficient. Take the case of redemption of a mortgage. The value of the suit is the amount of the mortgage. The land sought to be recovered may be worth lakhs while the mortgage amount may be only a few hundreds. An instance of this kind is to be found in Second Appeal No. 852 of 1912.

In a recent case *Ayyalu Naidu* v. *Ramasami Raja* (C. M. A. 131 of 1915) in this Court, Oldfield and Krishnan, JJ. followed the decision in *Ijjatula Bhuyan* v. *Chandra Mohan Banerjee* [1] and in *Chathanath Madhavi* v. *Chathanath Kunhunni Menon* [2]. Though the last case may be distinguished on the ground that the original suit was in the Subordinate Court, the decision in C. M. A. No. 131 of 1915 cannot be so distinguished. As we are unable to agree with the learned Judges who decided this last case and in view of the large body of Judicial opinion against our view, we think it will be more satisfactory if the question is disposed of by a Full Bench, and we accordingly refer the following question to the Full Bench.

"Whether in suits for accounts instituted in a District Munsif's Court, an appeal from the final decree which awards more than Rs. 5,000 lies to the District Court or the High Court."

The *Hon. Mr. B. N. Sarma* for the appellants :—

The appeal lies only to the High Court directly from the Munsif's Court. If the amount of the decree is more than Rs. 2,500 but less than Rs. 5,000, then the appeal lies to the District Court. If the decree is for more than Rs. 5,000 as here, the appeal lies only to the High Court. The Legislature has for reasons of public policy restricted the jurisdiction of the District Court. Reference was made to Ss. 12 and 13 of the Madras Civil Courts Act, S. 8 of the Suits Valuation Act, Ss. 7 (4) and 11 of the Court Fees Act. S. 7 (4) of the Court Fees Act provides that the valuation of the appeal shall be according to the appellant's valuation.

If the plff. claims on appeal more than what the decree gives him, that claim has to be taken as the subject-matter of the suit.

1. (1907) I. L. R. 34 C. 958. 2. (1893) 4 M. L. J. 43.

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[*Srinivasa Aiyangar, J.* :—The subject-matter of the suit depends on the prayer in the plaint and cannot change according to what the plaintiff chooses to claim from time to time.]

S. 11 of the Court Fees Act contemplates a case like that.

[*Srinivasa Aiyangar, J.* :—S. 11 of the Court Fees Act has nothing to do with fixing the valuation of the suit or jurisdiction. That is the province of the Suits Valuation Act.]

[*Abdur Rahim, J.* :—S. 12 of the Madras Civil Courts Act merely prohibits a Munsif from entertaining a suit of more than Rs. 2,500 in value, and does not prevent him from passing a decree for more than Rs. 2,500.]

[The question here is what is the proper forum for appeal from the decision of the Munsif. *Chattanath Madhavi* v. *Chattanath Kunhunni Menon* [1], answers the question in favour of the appellants.]

Reference was made to *Ibrahimje Issaje* v. *Bejanje Jamsedje* [2], *Gulab Khan* v. *Abdul Wahab Khan* [3], *Ijjatula Bhuljān* v. *Chandra Mohan Bannerjee* [4], *Ramjit Messer* v. *Ramadar Singh* [5], *Goswami Sri Raman Lalji* v. *Bohra Desraj* [6], *Bhupendra Kumar Chakravarti* v. *Purna Chandra Bose* [7], *Golap Singh* v. *Indra Coomar Hazra* [8], lays down that a Munsif cannot pass a decree beyond his own pecuniary jurisdiction.

By bringing a suit in the Munsif's Court, the plaintiff must be deemed to have given up his claim for anything in excess of the Court's pecuniary jurisdiction.

[*Srinivasa Aiyangar, J.*—See *Panchuram Tekadar* v. *Kinoo Haldar* [9].]

Arogya Udayan v. *Appachi Rowthan* [10] is *obiter* and no reasons are given. *Ratnasami Chetti* v. *Ratnammal* [11], merely follows the earlier decision. *Muttammal* v. *Chinnana Govindan* [12], *Madho Das* v. *Ramji Patak* [13], are in my favour.

1. (1898) 4 M. L. J. 43.
2. (1895) I. L. R. 20 B. 265, 267.
3. (1904) I. L. R. 31 C. 365.
4. (1907) I. L. R. 34 C. 954, 958.
5. (1912) 17 C. W. N. 116.
6. (1910) I. L. R. 32 A. 222.
7. (1910) I. L. R. 43 C. 650.
8. (1909) 13 C. W. N. 493, 497.
9. (1912) I. L. R. 40 C. 56.
10. (1902) I. L. R. 25 M. 543.
11. (1914) 27 M. L. J. 388.
12. (1880) I. L. R. 4 M. 220.
13. (1894) I. L. R. 16 A. 286.

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V. Ramesam for respondent, relied on the reasoning in the Order of Reference.

The Court expressed the following

Opinion:—Our answer to the question referred to us is that where a suit for accounts is instituted in a District Munsiff's Court the plaintiff valuing the subject-matter of the suit at an amount within the pecuniary jurisdiction of the District Munsiff and a decree is passed for more than Rs. 5,000 the appeal from that decree lies to the District Court and not to the High Court. The question is fully discussed in the Order of Reference and it is not necessary to add anything. We overrule the decision in *Ayyalu Naidu* v. *Ramasami Raja* (C. M. A. 131 of 1915), which follows *Ijjatulla Bhuyan* v. *Chandra Mohan Banerjee* [1], and *Chathanath Madhavi* v. *Chathanath Kunhunni Menon* [2].

We may mention that the case in *Muttammal* v. *Chinnana Goundan* [3], which has been referred to at the bar does not affect the present question.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Seshagiri Aiyar.

Pankajammal ... *Appellant* * (*Plaintiff*).

v.

Secretary of State for India by the Collector of North Arcot and others. *Respondents (Defendants and L. Rep. 4th defendant).*

Pankajammal v. Secretary of State for India.

Right to perform festival—Ubhayakar—Daughter succeeding as heir—Marriage in another family—No bar—Onus—Usage—S. 100 Cl. (a) Civil Procedure Code—Scope of—High Court's power to review evidence.

The right to perform a festival is a secular privilege and the daughter of an *Ubhayakar* is *prima facie* entitled to perform a festival in a temple and the fact that she is married in another family will not deprive her of the right. *Tangirala Chiranjivi* v. *Raja Mankiya Rao* [4] *Raja Rajeswari Ammal* v. *Subrahmanya* [5] followed.

There is no analogy between the holding of a subordinate trusteeship like Kattalai *dharmakartaship* and the performance of a festival.

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* L. P. A. 123 of 1915. 24th November 1916.

1. (1907) I. L. R. 34 Cal. 958.
2. (1898) 4 M. L. J. 48.
3. (1881) I.L.R. 4 M. 220.
4. (1915) 27 M. L. J. 179.
5. (1915) 30 M. L. J. 222.

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The trustees of a temple are bound to receive the money to perform a festival and from whomsoever it may come. *Venganuithan* v. *Pandaneswara* [1] followed.

Where a special custom, by which none but males could perform such a festival, is set up, the onus of proof is on the party setting up such custom.

Scope of S. 100 Cl. (a) of the C.P. Code regarding the powers of the High Court to consider evidence in proof of a custom, considered. *Nivath Singh* v. *Bhikki Singh* [2] referred to.

Appeal under clause 15 of the Letters Patent, against the judgment of the Honourable Mr. Justice Srinivasa Aiyangar dated 21st July 1915 in Second Appeal No. 2376 of 1914 preferred against the decree of the District Court of North Arcot in A. S. No. 850 of 1913 (O. S. No. 215 of 1912 on the file of the Court of the District Munsif of Ranipet).

The Plaintiff sued for a declaration that she as the sole heir to her father, Thandiri Veeraraghava Tatachar, is entitled to perform the Chitrapoornami festival by turns and to recover from the Collector of N. Arcot a sum of Rs. 116-0-7 to which she was entitled as an *Ubhayakar* who has performed the festival. The 1st Defendant pleaded that if she established her right to receive in a Civil Court he was willing to pay. The other Defendants who were the kinsmen of the plaintiff's father pleaded that the plaintiff was not entitled to succeed on the ground that the right to perform the festival was confined to the male members of the Thandri Tatachar family alone, and that the plaintiff being a female and married in another family could not succeed, according to usage. Both the lower courts held that the plaintiff must establish that she as heir is entitled to perform the festival and that she has failed to discharge the burden.

T. R. Ramachandra Iyer and T. M. Vedantam for Appellants.

N. S. Rangasami Iyengar for Respondents 2 and 3.

The Court delivered the following

Judgment:—The question in this case is whether the daughter of a Thathachari belonging to the Thandri family is disqualified from performing a festival in the Conjeevaram Temple by reason of the fact, that she has been married into another family. The marriage may give her a different *gotram* but it is not right to say that she ceases to belong to the family of her father on that account. She and her sons would be the heirs to her father's property. The right to perform a festival is a secular privilege,

1. (1882) I. L. R. 6 M 151.
2. (1885) I. L. R. 7 A. 650, 653.

and has no connection with the right to *Theertham* and other honours. The learned Judge in the Court below seems to have thought that the claim to perform the festival carried with it the right to *Theerthams* and to the other honours belonging to the Thathachari family. In this Court this portion of the judgment was not sought to be supported. It was argued that the right to perform a festival conferred an office, and that such an office could be held only by a male member of the Thathachariar's family. There is no analogy between the holding of a subordinate trusteeship like a Kattalai Dharmakarthaship and the performance of a festival. The cases quoted relate to the former class, and have no bearing on the latter. On the other hand it has been held in this Court that a female is not incompetent by reason of her sex, from claiming the Archaka right. *Tangirala Chiranjivi* v. *Raja Manikya Rao* [1] *Raja Rajeswari Ammal* v. *Subramanya Archakar* [2]. It would ordinarily be the duty of the temple authorities to receive the money that may be tendered to perform a festival from whomsoever it may come. In *Vengamuthan* v. *Pandaveswara,* [3] it was held that such a contribution from a dancing girl should not be rejected. *Prima facie* therefore, the daughter of the last Ubayakkar would be entitled to ask the temple trustees to receive the expenses of the festival from her. If it is objected that none but a male could perform such a festival, it is for those that set up this special custom to prove it. However, we do not want to decide this case on the ground that the defendants have not established their contention. We are clearly of opinion that the learned Judge is wrong in holding that the burden was on the plaintiff. In a case like this, when both sides have let in evidence the best course would be to weigh the evidence as a whole, without throwing the burden of proof on either party. In this view we must reverse the decree of the learned Judge of this Court and of the District Judge and remand the appeal to him for disposal on the merits.

Before we send the case down it is desirable to advert to the extreme contention that was put forward in this court that in all cases where evidence as to custom has been let in, we are bound to weigh such evidence and decide for ourselves upon the materials. Mr. Ramachandra Aiyar who came in at a later stage

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1. (1914) 27 M. L. J. 179. 2. (1915) 30 M. L. J. 222.

3. (1882) I. L. R. 6 M. 511.

Pankajammal v. Secretary of State for India.

of the case conceded that this contention is not supported by authority. The learned vakil argued that the question whether on the facts as found, the courts below were justified in saying that a custom has not been proved is a point on which the High Court is entitled to draw its own inference. To the proposition thus advanced we see no objection. But we must point out that the value to be attached to the evidence let in, its reliability and in a measure, its relevancy are all matters for the court below and that the High Court would not be justified in weighing the evidence, as if it were sitting to hear a first appeal.

It is open to doubt whether the expression, 'a usage having the force of law' in section 100 (a) C.P. Code, should not be confined to the usages of the country or of the community as suggested by Petheram, C. J. in *Nivath Singh* v. *Bhikki Singh* [1]. Customs like pre-emption, the law merchant and usages like those referred to in section 11 of Act VIII of 1865, seem to have been in the contemplation of the legislature. It seems doubtful whether a private right, like the one, we are considering falls within section 100, clause (a). However that may be, we feel no doubt that the High Court should not be called upon to examine the oral and documentary evidence relating to a private custom as if it were hearing a first appeal.

For the reasons already given, we reverse the Second Appeal and remand it for disposal on the merits. The costs will abide the result.

A. V. V.

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1. (1885) I. L. R. 7 A. 650.

PRIVY COUNCIL.

Present ;—Lord Parker of Waddington, Lord Sumner, Sir John Edge and Sir Lawrence Jenkins.

Har Chandi Lal and others ... *Appellants**

v.

Sheoraj Singh and others ... *Respondents.*

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Har Chandi Lal *v.* Sheoraj Singh

Mortgage — Subsequent invalid mortgage—Intention to accept new security frustrated—Performance by third party—Indian Contract Act, 1872 (Act IX of 1872) S. 41.

A Hindu mortgaged his five-sixth share of a village and died leaving a widow and a separated nephew who was entitled to the reversion if he survived the widow. This nephew mortgaged the remaining one-sixth, to which he was entitled of his own right, to the same mortgagee. Thereafter the widow and nephew jointly executed two mortgages of the whole village for the amounts due under their old mortgages. The mortgagee sued on these later deeds and obtained a decree, which as against the widow was set aside on appeal. Thereafter he sued on the original mortgage of the five-sixth share.

Held, that though the mortgagee's intention at the time of the later deeds was to accept a new security in lieu of the old one, yet, as this was frustrated by the fact that the later deeds were held not binding on the widow, it was contrary to equity and good conscience that the nephew's heirs, who had succeeded her as reversioners of her husband, should set up the later deeds as a release of the mortgage effected by him ; and that the mortgagee could enforce it against them.

S. 41 of the Indian Contract Act, 1872, which provides for the discharge of a contract by the acceptance of performance by a third party, applies only where the contract has in fact been performed.

Appeal from a decree of the Allahabad High Court, (25th Feb. 1913) reversing a decree of the Subordinate Judge of Bareilly.

[The Judgment of the High Court is reported in 11 A. L. J. 365.]

The facts of the case sufficiently appear from their Lordships' judgment. The Subordinate Judge decreed plaintiff's suit on the mortgage of 13th November 1876. On appeal the High Court (Richards, C. J., and Banerji, J.) held that as at the time of suit the plaintiffs were neither possessed of nor entitled to the possession of the mortgage deed sued on the suit was not maintainable further that the mortgagee must be taken to have accepted the performance by Phul Singh of the contract sued on and that under S. 41 of the Indian Contract Act, 1872, it was thereby discharged.

Hence this appeal.

DeGruyther, K. C. and *Dube*, for appellants :—The mortgage sued on was not discharged by the substitution of a new contract under S. 62 of the Indian Contract Act. It may have been

* 6th November 1916.

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intended that the widow's mortgage of 1887 should discharge the mortgage of 1876, but having repudiated her liability under the later mortgage she could not put forward that contention, and the respondents, who were joined as parties in the Privy Council upon her death, can be in no better position than she was. There was no acceptance of performance by the nephew Phul Singh, or in fact any performance by him, so as to amount to a discharge under S. 41 of the Contract Act.

Sir W. Garth for respondents :—When the mortgage of 1887 was held not to be binding upon the widow, the mortgagee was put to his election either to enforce against her the mortgage of 1876 or to continue to hold Phul Singh liable upon his mortgage of 1887, which affected the whole mouza. He could not rely upon both. He must be taken to have accepted the liability of Phul Singh upon the decree against the whole property as a performance of the contract by Jai Chand.

Dube in reply. The decree against Phul Singh was executed only against his one-sixth share of the mouza.

Their Lordships' judgment was delivered (December 18, 1916) by

Lord Parker.

Lord Parker of Waddington :—This is an appeal from a decree dated the 25th February, 1913, of the High Court (Allahabad), reversing a decree dated the 8th July, 1911, of the Subordinate Judge of Bareilly. The question is whether the appellants are entitled to enforce a mortgage against the respondents.

The mortgage in question is dated the 13th November, 1876, and was executed by Jai Chand in favour of Lala Chatri Lal, the mortgaged property being a five-sixth share in the Mauza Nagaria Bikrampur. The amount secured was 5,500 rupees. The mortgagor died leaving a widow, Musammat Nandan, and a separated nephew, Phul Singh. Under the Hindu Law Musammat Nandan had a widow's interest and Phul Singh had a reversion contingent on his surviving her in the property subject to the mortgage. Musammat Nandan could dispose of the property with the concurrence of Phul Singh, but Phul Singh could not, without the concurrence of Musammat Nandan, dispose of the reversion so as to defeat the interests of those who would become entitled if he died in her life time.

Phul Singh was the owner of the remaining one-sixth share in the mauza in question. On the 6th March, 1879, and

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the 26th September, 1881, he mortgaged his one-sixth in favour of Lala Chatri Lal for 1,000 rupees and 3,000 rupees, respectively, with interest. Obviously, therefore, Lala Chatri Lal had a better security for the 5,500 rupees due on Jai Chand's five-sixth share than he had for the 1,000 rupees and 3,000 rupees due on Phul Singh's one-sixth share. On the 9th September and 30th October, 1887, respectively, Musammat Nandan and Phul Singh, executed or were expressed, to execute two mortgages in favour of Lala Chatri Lal. Each mortgage purported to affect the entire mauza, the first being in respect of the principal and interest due on Jai Chand's mortgage of the 13th November 1876, and the second being in respect of the principal and interest due on Phul Singh's mortgages of the 6th March, 1879, and the 26th September, 1881. If these mortgages were valid, Lala Chatri Lal would get the security of Jai Chand's property for the indebtedness of Phul Singh, and the security of Phul Singh's property for the indebtedness of Jai Chand.

In the year 1896 the mortgagee instituted a suit on the basis of the two deeds of 1887. The Subordinate Judge decreed the suit in full, so that judgment went for the whole amount of the indebtedness both of Phul Singh and Jai Chand against the entire mauza. Both Phul Singh and Musammat Nandan appealed, but Phul Singh having shortly afterwards died, his appeal was abandoned by his heirs (the first three defendants in the present suit). The appeal of Musammat Nandan however came on for hearing, and was allowed by the High Court. It was held that even if she had in fact executed the deeds of 1887, they were not binding on her. The mortgagee appealed to His Majesty in Council. Musammat Nandan died pending the appeal, and the first three defendants in the present suit as Jai Chand's heirs were made respondents in her place. The appeal was dismissed. The real effect therefore of the deeds of 1887 must be determined on the footing that Musammat Nandan had never been made a party thereto. On this footing, Phul Singh must be taken to have made his own property a security of Jai Chand's indebtedness, and to have tried to make Jai Chand's property a security for his own indebtedness—an attempt which could only succeed if he survived Mussammat Nandan, which event did not happen. It follows that on Mussammat Nandan's death the first three defendants succeeded to Jai

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Chand's property, subject to the mortgage of the 13th November, 1876, but free from any further charge purported to be created by Phul Singh. The only difficulty is that the High Court, in allowing the appeal of Mussammat Nandan, left the order of the Subordinate Judge standing as against Phul Singh. But the first three defendants do not claim Jai Chand's property as heirs of Phul Singh, but as heirs of Jai Chand, and it appears that after Musammat Nandan's death the order of the Subordinate Judge was executed (and, in their Lordships' opinion, rightly executed) only as against Phul Singh's own one-sixth share of the mauza, and not against Jai Chand's five-sixth share. The real question is whether anything has happened to preclude the mortgagee from enforcing the mortgage of the 13th November, 1876, against the first three defendants as the now owners of Jai Chand's five-sixth share.

It is, of course, true that the mortgagee's intention at the time when the two deeds of 1887 were executed was to accept a new security, extending to the whole mauza, for the indebtedness both of Jai Chand and Phul Singh in lieu (*inter alia*) of the security of the 13th November, 1876. Pursuant to this intention, he appears to have handed over the mortgage of the 13th November, 1876, to Phul Singh. But the original intention of the mortgagee was entirely frustrated by the fact that the two deeds were held not to be binding on Musammat Nandan, and it does not appear to their Lordships to be consistent with equity or good conscience that the first three defendants, having successfully maintained that the transaction embodied in the two deeds of 1887 was not binding on Musammat Nandan, and consequently did not bind them as heirs of Jai Chand, should now claim the benefit of such transaction as a release of the mortgage of the 13th November, 1876. In their Lordships' opinion S. 41 of the Indian Contract Act, upon which the High Court relied, has no application to a case like the present. It applies only where a contract has been in fact performed by some person other than the person bound thereby. If the mortgage of the 13th November, 1876, be looked upon as a contract to pay money it cannot be said to have been performed at all, for though Phul Singh's one-sixth share was sold in the suit of 1896, the amount realised was not sufficient to meet the indebtedness of Phul Singh himself. Still less can Phul Singh be said to have performed the contract

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contained in the mortgage of the 13th November, 1876, if such mortgage be looked on as a contract to give security, for his attempt to create a security on Jai Chand's property admittedly failed. In their Lordships' opinion, therefore, the mortgage of the 13th November, 1876, was in the events which happened wholly unaffected by the mortgages of 1887.

It being admitted that if the mortgage of the 13th November, 1876 is a subsisting mortgage, it is not statute barred, the appeal succeeds, and the order of the Subordinate Judge ought to be restored with costs here and below. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for Appellants ;—*T. L. Wilson & Co.*

Solicitors for Respondents :—*Barrow Rogers and Nevill.*

A. P. P.

IN THE PRIVY COUNCIL.

Present :—The Lord Chancellor (Lord Buckmaster), Lord Atkinson, Lord Wrenbury, and Mr. Ameer Ali.

[On appeal from the High Court of Judicature at Fort William.]

Sashi Bhushan Misra and others ... *Appellants**

v.

Raja Jyoti Prasad Singh Deo and others ... *Respondents.*

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Sashi Bhushan Misra
v.
Raja Jyoti Prasad Singh.

Mineral rights—Presumption in favour of Zemindar's ownership—Talabi Brahmottar grant made prior to 1790—Grant of without specification of minerals, effect of.

When a grant is made by a Zemindar of a tenure to a fixed rent, although the tenure be permanent, heritable, and transferable, minerals will not be held to have formed part of the grant in the absence of express evidence to that effect.

Held, accordingly, that a Talabi Brahmottar grant of a mouzah of a date prior to 1790 did not carry with it mineral rights.

Jyoti Prasad Singh v. *Lachmipur Coal Company* [1] affirmed. *Hari Narayan Singh* v. *Sriram Chakravarti* [2]. *Durga Prasad Singh* v. *Braja Nath Bose* [3] followed.

Appeal from a judgment and decree of the Calcutta High Court (Coxe and Teunon, JJ.) dated July 11, 1911 reversing a decree of the Subordinate Judge of Burdwan.

This appeal related to the mineral rights of a village named Panchgachia. The suit was brought by the first respondent against

* 7th November 1916.

1. (1911) I. L. R. 38 C. 845.
2. (1910) L. R. 37 I. A. 136 : I. L. R. 37 C. 723.
3. (1911) L. R. 39 I. A. 133 : I. L. R. 39 C. 696.

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appellant and the other respondents. The plaint alleged that plaintiff was proprietor and Zemindar of the Pachete Estate, of which mouza Panchgachia was a part, that he was "entitled to all rights surface and mineral" in the mouza, which "is an ordinary *Mal* village" standing in his sherista in the name of defendants 5 to 35, who were holding the village "in Jamai right," that the remaining defendants had obtained a mineral lease from defendants 5 to 35, but that plaintiff had never parted with the mineral rights and the defendants or any of them had no right thereto. Plaintiff prayed for a declaration that he was entitled to the mineral rights of the mouzas and that defendants had no right thereto, for possession of such rights, and for a perpetual injunction restraining defendants from working the mines in the village.

Defendant's main contention was that before the permanent settlement plaintiff's predecessor had made a grant of the village as Talabi Brahmottar at a fixed rent (mogali) to their predecessors, and that all rights in the village including the mineral rights belonged to them, and that plaintiff had no right therein except the right of demanding and receiving from them the fixed "mogali" or rent.

The Subordinate Judge stated that "there is no evidence oral or documentary as to the nature of the original grant or the person by whom it was made or the person or persons in whose favour it was made"; and found that defendants 5 to 35 had a Talabi Brahmottar right in the mouza from the date of the permanent settlement at a fixed rent and exercised permanent transferable and heritable rights in respect of their tenure. On these findings, and on the authority of *Sri Ram Chakravarti* v. *Hari Narayan Singh* [1], he held that plaintiff had no right to the minerals which belonged to the defendant tenure holders, and dismissed the suit.

On appeal the High Court (Coxe and Teunon, JJ.) affirmed the Sub-Judge's finding that defendants 5 to 35 were permanent tenure holders at fixed rent, but refused to be bound by the decision in *Sri Ram Chakravarthi* v. *Hari Narayan Singh*, [1] which was then under appeal to the Privy Council, and held that in the absence of all evidence of the terms of the grant the mineral rights must be regarded as the property of the Zemindar plaintiff. They decreed the Suit. The case in the High Court is reported at I. L. R. 38 Cal. 845.

1. (1905) I. L. R. 33 Cal. 54.

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The defendants-tenure-holders appealed to the Privy Council.

A. M. Dunne for appellants-Appellants are grantees of an old Mogli Brahmottar, which constitutes and imports a gift or grant to Brahmins. It is not a tenancy of any kind nor are we lessees. The basis of the tenure is by a grant or conveyance of the village.

[*Mr. Ameer Ali* :—The question is what is the character of the grant and what passes under it.]

The Courts in India have found that we are tenure holders paying a small rent and that our tenure is permanent heritable and transferable. The suit is based on the village being a *Mal* village. Both Courts have found that it is not.

[*The Lord Chancellor* :—Is it in the form of a fee farm grant.]

It is a grant of the land itself. In such a grant there is no reversion in the zamindar, who has no right in the lands granted except to receive the rent: *Rani Sonet Kooer* v. *Mirza Himmut Bahadur* [1].

[*Mr. Ameer Ali* referred to *Saheb Zadee Begum* v. *Mizra Himmut Bahadur* [2] for the previous history of the case.]

For the meaning of Brahmottar grant, reference was made to Wilson's Glossary, Field's Introduction to the Bengal Regulations, Glossary to the Fifth Report, Vol. 2, and Hunter's Statistical Abstract of Bengal, Vol. 17, pp. 322, 388 (Mogali 1 and 362) (Talabi). Reference was also made to Bengal Regulation VIII of 1793, preamble and Ss. 1 and 3, *Nil Madhab Sikdar* v. *Narattan Sikdar* [3].

At the time of the grant the zamindar was the proprietor of the land in the village and possessed the minerals, which passed to the defendants by the grant.

This Board's previous decisions do not apply to Talabi Brahmottar, which is a grant of all the grantor's rights and as such carries with it the right to minerals: *Megh Lal Pande* v. *Raj Kumar Thakur* [4]. In *Hari Narayan Singh* v. *Sri Ram Chakravarti* [5], the tenure was not permanent. In *Durga Prasad Singh* v. *Braja Nath Bose* [6], the tenure was a service tenure. *Kunja Behari Seal* v. *Durga Prasad Singh* [7], and *Nowaghir Coal Co. Ld.* v. *Sashi Bhushan Roy* [8], follow, *Hari Narain Singh* v. *Sri Ram Chakravarti* [5], and consequently are not authorities against the present contention.

1. (1876) L. R. 3 I. A. 92 : I. L. R. 1 C. 391.
2. (1869) 12 W. R. 512.
3. (1890) I. L. R. 17 C. 826.
4. (1906) I. L. R. 34 C. 358.
5. (1910) L. R. 37 I. A. 136 : 37 Cal. 723.
6. (1911) L. R. 39 I. A. 133 : 39 Cal. 696.
7. (1914) I. L. R. 42 C. 846.
8. (1914) 19 C. W. N. 375.

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In one case the Calcutta High Court has held that a permanent lease is liable to forfeiture on the tenant's denial of the landlord's title: *Kali Das Ahiri* v. *Monmohini Dasi* [1], but so far as this Board is concerned the question whether the Zemindar has any right other than of that demanding and receiving rent is *res integra.*

Sir Robert Finlay, K.C., DeGruyther, K.C., J. M. Parikh, and *Arfan Ali* for the plaintiff-respondent—The appeal is concluded by the cases reported in *Hari Narain Singh* v. *Sri Ram Chakravarti* [2] and *Durga Prasad Singh* v. *Braja Nath Bose* [3]. In the earlier case the High Court had held, as appears from the report in *Sri Ram Chakravarthi* v. *Hari Narayan Singh* [4], that the tenure debuttar was permanent, heritable and transferable and it was contended before this Board that there was not sufficient evidence to establish that finding. The second point decided by the High Court was that where the tenure was permanent, heritable, and transferable, the minerals passed to the tenure holder. It was contended before the Board that even if the tenure were such as found by the High Court, still the minerals remained with the Zemindar unless the tenure holder could show that the Zemindar had parted with his rights thereto. The Board's judgment in *Abhiram Goswami* v. *Shyama Charan Nandi* [5] deals with these two points separately, and the latter part of that judgment clearly decides in favour of the second contention. This is made quite clear by Lord Macnaughten's judgment in the later case, *Durga Prasad Singh* v. *Braja Nath Bose* [3], Lord Macnaghten was a party to the earlier judgment, and what be says about it is quite authoritative. *Durga Prasad Singh* v. *Braja Nath Bose* [3] reverses *Megh Lal Pandey Raj Kumari Thakur* [6] and *Hari Narayan Singh* v. *Sri Ram Chakravarti* [2] is followed in *Kunja Behari Lal* v. *Durga Prasad Singh* [7] and *Nowaghur Coal Co. Ltd.* v. *Sashi Bhusan Ray* [8], where the High Court has twice interpreted this Board's decision in the sense for which we contend.

Assuming however that the appeal is not concluded by authority, we submit that the persons with whom the permanent Settle-

1. (1891) I. L. R. 24 C. 440.
2. (1910) L. R. 37 I. A. 136 : I. L. R. 37 C. 723.
3. (1912) L. R. 39 I. A 133 : I. L. R. 39 C. 696.
4. (1905) I. L. R. 33 Cal. 54.
5. (1909) L. R. 36 I. A. 148.
6. (1906) I. L. R. 34 Cal. 358.
7. (1914) I. L. R. 42 Cal 846.
8. (1914) 19 C. W. N. 375.

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ment was made where the only proprietors of the land, and those holding under them lessees. It matters not what the Zemindar's position was before the permanent settlement. The relation between plaintiff and defendants is that of landlord and tenant. The tenancy must be either agricultural or non-agricultural. In either case the mineral would not pass to the tenant. Bengal Tenancy Act, 1885, Ss. 4, 5, 6, 10, 11, 18, 19, 20, 65 and 73, and Transfer of Property Act, 1882, S. 108 (0) which incorporates the law as to minerals as it stood before the passing of that Act.

A permanent tenure is not a conveyance in fee simple: *Abhiram Goswami* v. *Syama Charan Nandi* [1] approving *Kally Dass Ahiri* v. *Monmohini Dassee* [2].

We submit therefore that the point that a permanent tenure holder has all the rights of the proprietor subject to the payment of rent is not *res integra*. In 1808 defendant's predecessors themselves considered that they were lessees and as such obtained a decree in a suit brought by them under S. 55 of Bengal Regulation VIII of 1793 against plaintiffs' predecessor.

Dunne replied.

Their Lordship's judgment was delivered (December 8, 1915) by

Lord Buckmaster, L. C.

The Lord Chancellor.—The appellants in this case are the descendants and representatives of certain Brahmins to whom, at a date uncertain, but antecedent to 1790, the then Raja of Pachete made a Mokurarigrant of the village known as Mouzah Panchgachia; the question raised in this appeal is whether this grant carried with it the mineral rights in the soil.

In considering the question it is important to avoid giving to words used in connection with legal transactions in India the special and technical meaning that they possess in this country. According to our law, the word "grant" is strictly applicable to the conveyance at common law of remainders, reversions, and incorporeal hereditaments, which do not lie in livery, or of which livery could not be given. But in connection with the present dispute, the word has no such meaning, and it is important at the outset to bear this in mind.

The grant under which the appellants claim cannot be found, nor is there any copy in existence, nor any record of its literal

1. (1909) L. R. 36 I. A. 145, 166 2. (1897) I. L. R. 24 Cal. 440.

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contents. It i-, however, admitted that the grant was a Talabi Brahmattar grant.

Such a grant is defined in Wilson's Glossary as "land granted rent free to Brahmins for their support and that of their descendants, probably as a reward for their sanctity of living or to enable them to devote themselves to religious duties and education."

If after the words "rent free" be added the words "or at a fixed rent," this statement may be accepted as an accurate description of the origin of the grant, but in itself it contains no definition of the characteristics of the tenure. It has, however, been found in the present case that the tenure of the lands in dispute is permanent and heritable, and confers upon the holder for the time being full rights of alienation; but even these findings, though they invest the tenure with attributes of absolute ownership, afford little assistance in determining what it was that the grant passed.

Now, by the Permanent Settlement of 1793, all the mineral rights were confirmed to the Zamindars, and the first respondent to this appeal represents their interest in the estate. If such rights were already possessed and recognised at the date of the settlement this confirmation would hardly have been needed, and this suggests that up to that date the rights enjoyed and granted in the lands were not considered as including the minerals; if this were so, as the grant in question could have created no rights in the property which the grantor did not possess, no right to the minerals could have been conferred. However that may be, there is certainly nothing in the permanent settlement to which the appellants can turn in support of their contention. Indeed, apart from the evidence furnished from the Sarsikal Jumma, and the facts that have been stated as to the well-recognised attributes of a Brahmattar grant, the appellants have been unable to furnish any evidence at all in support of the view that the grant conveyed the minerals; their case really depends upon the assumption that the character of the grant itself is sufficient to establish their claim.

This question has been the subject of much controversy in the Indian Courts, and the appellants can certainly point to some powerful and well-reasoned judgments in support of their view. But, in their Lordships' opinion, the matter has been set at rest

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by the decision of the Judicial Committee. In the case of *Kumar Hari Narayan Singh Deo Bahadur* v. *Sriram Chakravarti* [1] a question arose as to the ownership of the minerals underlying a certain village called Petena which had been granted to an idol of whom the Goswamis were the priests. In that case, as in this, the grant was not forthcoming, but it was held in the High Court that the tenure of the Goswamis gave them permanent, heritable, and transferable rights and, upon this finding, the High Court decided that the minerals had passed under the original gift. Upon appeal to the Privy Council this judgment was questioned upon two grounds. First, that there was no evidence that the tenure carried with it permanent, heritable, and transferable rights; and secondly that, even if this contention were wrong, in the absence of express evidence that the creation of the tenure was accompanied with the grant of the minerals, the minerals did not pass. The Judicial Committee decided in favour of the appellants' contention, and the material part of the judgment is to be found on p. 145 of the report. The two points are there dealt with, and upon the first Lord Collins, in delivering the judgment of the Board, made this statement:—

"On this meagre foundation of fact the two Judges who constituted the High Court, have built up the theory that the Goswamis were tenure-holders having permanent, heritable, and transferable rights."

He then proceeds to deal with the judgment of Mr. Justice Pargiter, who took the view that the creation of such a grant carried with it the mineral rights; and he expresses disagreement with this view of the law, stating that it appeared to ignore the distinction between the mere tenure-holder and the Zamindar; the judgment concludes by saying that the Zamindar must be presumed to be the owner of the ground rights in the absence of evidence that he ever parted with them. The Counsel for the appellants has strongly urged that the whole of this judgment depends upon their Lordships' refusing to accept the view that the tenure in that case was permanent, transferable, and heritable, and that the judgment only applies to an estate lacking those qualities. Their Lordships realise that the judgment, in the absence of the argument, might be open to this construction; but, read in the light of the then appellants' contention, they think that the two passages referred to dealt with the two separate points which were raised by the appel-

1. (1910) L. R. 37 I. A. 136; I. L. R. 37 C. 723.

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lants, and that the latter part of the judgment was really independent of the statement which expressed dissatisfaction with the conclusion drawn as to the character of the tenure. Their Lordships would have felt more uncertainty about this view had it not been for a second judgment in a subsequent case *Raja Sri Sri Durga Prasad Singh* v. *Braja Nath Bose*, [1].

In that case also the nature of the grant was not identical with that of the grant in the present case. It was the grant to the holders of an office—the office of Digwar, and it was permanent only in the sense that, so long as that office continued to be held by members of the same family, the rights created by the grant would be assured to the holders for the time being of the office. In that case the High Court followed the decision of the High Court in the former case, which had not then been reversed, and Lord Macnaghten, in giving the judgment reversing the High Court, referred to that fact in the following terms:—

"The learned Judges on appeal seem to have beeen misled by a decision of the High Court in the case of *Kumar Hari Narayan Singh Deo Bahadur* v. *Sriram Chakravarti*, [2] which was afterwards reversed by this Board. There certain persons, called Goswamis or Gossains, priests of a Hindu idol to which a certain village had been assigned on a permanent debuttar tenure at a small annual rent, granted a lease of the underlying minerals. The High Court held that the mineral rights were vested in the Gossains. But it was laid down by this tribunal that it must be presumed that the mineral rights remained in the Zamindar in the absence of proof that he had parted with them."

It is plain from this statement by Lord Macnaghten, who was one of the members of the Board in the former case, that the earlier decision was intended to apply to a permanent debuttar tenure. In other words, that the doubt that was thrown in the former case as to the sufficiency of the evidence on which the tenure had been held to be permanent, heritable, and transferable, did not affect the main judgment in the case, which was based upon the hypothesis that these attributes of the tenure had been established.

These decisions, therefore, have laid down a principle which applies to and concludes the present dispute. They establish that when a grant is made by a Zamindar of a tenure at a fixed rent, although the tenure may be permanent, heritable, and transfer

1. (1912) L. R. 39 I. A. 133 ; I. L. R. 39 C. 696.
2. (1910) L. R. 37 I. A. 136 ; I. L. R. 37 C. 723.

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able, minerals will not be held to have formed part of the grant in the absence of express evidence to that effect.

It is admitted in the present instance that the only evidence that can be relied on arises from the characteristics of the tenure and the statement as to the object and purpose for which the grant was made as stated in Wilson's Glossary. For reasons that have already been given, this affords no evidence necessary for the purpose, and their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

In conclusion their Lordships desire once more to call attention to the tedious protraction of Indian litigation. It can only be a misfortune that a dispute such as the present, which affects a matter so important as the right of mining—a right of great value for the development and prosperity of any country—should have been in abeyance for a period which, from the commencement of the present dispute until the day of hearing of this appeal, has exceeded twelve years.

Solicitors for Appellant :—*Watkins and Hunter.*

Solicitor for Respondent :—*E. Dalgado.*

A. P. P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS. [FULL BENCH.]

Present :—Sir John Wallis, Chief Justice, Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Aiyangar.

A. S. Roderigues ... *Appellant** (*Respondent*).

v.

N. P. R. M. P. R. M. Ramasami Chettiar, and others ... *Respondents.* (*Petitioner and party, Respondent in the High Court*).

F. B.

Roderigues v. Ramasami Chettiar.

Provincial Insolvency Act (*III of* 1907)—*S.* 37—"Creditor"—*Meaning—Surety for insolvent if a creditor for purposes of S.* 37.

A person who stood surety for the payment of a debt by the insolvent is a *creditor* within the meaning of that expression in S. 37 of the Provincial Insolvency Act.

Nalam Viswanatham v. *Official Assignee Madras* [1]. Over-ruled.

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* A. A. O. No. 370 of 1915. 6th December 1916.

1. – (1915) 32 I. C. 795.

F. B.

Roderigues
v.
Ramasami
Chettiar.

Appeal against the order of the District Court of Tinnevelly in I. A. No. 313 of 1915 in I. P. No. 3 of 1914.

When the case first came on for hearing the Court (Ayling and Seshagiri Aiyar, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

Narayana Aiyangar, the insolvent, was indebted to one Moideen Sahib. The appellant before us, Roderigues, stood surety for the payment of the debt. Narayana Aiyangar became heavily indebted after the date fixed for the payment of the debt. Thereupon Moideen sent a notice to Roderigues demanding payment. Roderigues in his turn applied to Narayana Aiyangar who executed a sale of the crops standing on his land on the 24th of January 1914: a creditor petitioned the District Court to declare Narayana Aiyangar an insolvent, 7 days after the sale. An application was made by the same creditor under S. 37 of Act III of 1907 to set aside the sale of the crops as amounting to undue preference. The learned District Judge in a careful judgment has granted the prayer. Hence this appeal.

The main question argued before us by Mr. Devadoss was that the sale to Roderigues, who was only a surety, not being a conveyance to a *creditor*, S. 37 has no application. Two other contentions were also raised—(*a*) that there was pressure upon Narayana Aiyangar and that consequently there was no voluntary preference; and (*b*) that the District Court was not competent upon a creditor's application to set aside a sale. We shall first dispose of the two latter contentions before dealing with the main question.

On the question of pressure, the facts found are that the insolvent and Roderigues were neighbours and friends, that Roderigues was aware of the involved circumstances of the insolvent, that the sale-deed was taken on trust without even looking at the property conveyed, and that there was no pressure brought to bear upon the insolvent to execute the sale-deed. On these facts, the District Judge was right in holding that the conveyance was clearly within the mischief of S. 37. We entirely agree with him. We do not think it necessary to refer to the authorities quoted by the learned counsel on this point.

On the question of the right of a creditor to apply, we have the authority of *Khushhali Ram* v. *Bholar Mal* [1]. The decision

1. (1915) I. L. R. 37 A. 252.

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in *Venkatakrishnama Chetti* v. *Lakshmi Narasimham* [1] is also in favour of the position that a creditor can apply. It was said that the insolvent may be harassed by a number of applications, if one creditor is permitted to exercise such a right. The obvious answer to that is, it would be open to the insolvent to move the court to bring the Receiver on the record on a creditor's application. We think it right to point out that Courts should ordinarily hear such applications only after giving notice to the Official Receiver, as that would safeguard the interests of the insolvent and of the general body of the creditors. No objection on the score of the incapacity of the creditors to apply was raised before the District Judge. We see no ground, as at present advised, for entertaining the objection at this stage.

Upon the principal question, there is the direct authority of this court in *Nalam Viswanatham* v. *Official Assignee of Madras* [2]. The arguments addressed to us in this case however incline us to think that that decision should be reconsidered. The circumstances which have induced us to take a different view from the learned judges who decided that case may be briefly summarised thus.

(1) There is direct authority in England and in this country for the proposition that a surety is a creditor: *In re Pain, Ex parte Read* [3] *In re Blackpool Motor Car Company, Limited: Hamilton* v. *Blackpool Motor Car Company, Limited,* [4] and *R. D. Sethna* v. *Kallianji* [5].

(2) The first two pronouncements are by judges of great authority on the question at issue. The opinion of Vaughan Williams, J. as he then was, and of Lord Justice Buckley should not be lightly departed on questions affecting the Bankruptcy law.

(3) The authorities relied on for the contrary proposition are to be gathered only from certain *obiter dicta* of the judges. In *In re Mills, Ex-parte. The Official Receiver,* [6] the real question was whether there could be fraudulent preference where the conveyance was made to a creditor, not for his own benefit, but with a view to secure the claims of the surety. In

1. (1912) M. W. N. 1001.
2. (1915) 32 I. C. 795.
3. (1897) 1 Q. B. 122.
4. (1901) 1 Ch. 77.
5. (1912) 15 Bom. L. R. 113.
6. 5 Morrell. 55.

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the course of the judgment, Lord Esher and the other Lords Justices say that the surety was not a creditor. This statement was not necessary for the decision in the case. Whether the person intended to be benefited was a surety or an utter stranger would not have affected the decision in the case. The same remarks apply to *In re The Stenotyper, Limited: Hastings Brothers* v. *The Stenotyper, Limited* [1] and to *In re Warron: Ex parte Trustee* [2].

(4) There are pronouncements by other judges which though not under the Bankruptcy law have a direct bearing on the question whether a surety is a creditor: per Swinfen Eady, J. in *Ascherson* v. *Tredegar Dry Dock and Wharf Co., Ltd.,* [3] and Lord Halsbury in *Sharp* v. *Jackson* [4]. The first of these cases was under the Company's Act and the question was whether when a company goes into a liquidation, a surety can prove his claim as a creditor.

(5) Text writers have almost unanimously held that a surety is a creditor. 2 Halsbury 281, May on Fraudulent Conveyances, page 36. Williams on Bankruptcy, page 301 and Wace on Bankruptcy, page 251.

(6) Ss. 28 and 29 of Act III of 1907 distinctly lay down that a person to whom a debt is due on a contingency is a creditor. We fail to see why that principle should not be applied to the interpretation of the term 'creditor' in S. 37.

(7) S. 44 of the English Bankruptcy Act was amended in 1913 so as to specifically bring in a guarantor and a surety. Lord Justice Vaughan Williams in his book on Bankruptcy points out that the section has been so amended to remove the doubts which may be entertained consequent on the *obiter dicta* of Lord Esher and the other judges in the cases already referred to.

These considerations and the weight and prestige attaching to a statement of law on this subject by Lord Justice Vaughan Williams have induced us to refer the consideration of the question decided in *Nalam Viswanathan* v. *Offical Assignee of Madras* [5], to a Full Bench. The principle to be borne in mind is that the Insolvency Law aims at securing equal rights to all persons who have been induced to come to the rescue of an insolvent and who have subsequently been affected by the application to declare him

1. (1901) 1 Ch. 250.
2. (1900) 2 Q. B. 138
3. (1909) 2 Ch. 401.
4. (1899) A. C. 419.
5. (1916) 32 I. C. 795

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an insolvent. If a surety can prove his claim after Bankruptcy, it is difficult to hold that he is not a creditor. Under the Indian Contract Act the liability of a surety is co-extensive with that of the principal debtor (S. 128). His liability arises the moment that the right of the creditor to sue accrues; and at the same moment his right to be indemnified by the principal debtor also accrues. The liability is always existing, though it may not be enforced at once. Under these circumstances it seems to us that the better view would be to hold with Vaughan Williams, L. J. and Buckley, L. J. that the surety is a creditor.

Having regard to the different view taken by Sadasiva Aiyar and Napier, JJ., in *Nalam Viswanathan* v. *Official Assignee of Madras* [1], and having regard also to the fact that the question is one of considerable importance we have resolved to refer the following question for the opinion of the Full Bench.

"Whether a person who stood surety for the payment of a debt by the insolvent is a *creditor* within the meaning of that expression in S. 37 of the Provincial Insolvency Act ?"

M. D. Devadoss, counsel for the Appellants.

A. Krishnaswami Aiyar, T. M. Ramaswami Aiyar, and *S. Ramaswami Aiyar*, for Respondents.

The Full Bench expressed the following

Opinion:—This question has been decided in England under the corresponding S. 48 of the Bankruptcy Act of 1883 in 1897 by Vaughan Williams, J., in *In re Paine: Ex-parte Read* [2] and in 1900 by Buckley, J., (now Lord Wrenbury) in *In re Blackpool Motor Car Company, Limited: Hamilton* v. *Blackpool Motor Car Company Limited* [3]. In the latter case the learned Judge after considering all the authorities including the dicta in *In re Mills: Ex-parte The Official Receiver*, [4] held following the earlier decision that a surety being entitled to prove in bankruptcy must be considered a creditor for the purpose of fraudulent preference under S. 48 of the Act of 1883. That decision has not since been questioned in England and may we think be accepted as settled law. This was apparently the view taken when the new consolidated Bankruptcy Act of 1914 was passed. The defect disclosed in S. 48 of the Act of 1883 by the decisions in *In re Mills: Ex parte The Official Receiver* [1], *In re Warren: Exparte Trustee*[5] and *In re*

1. (1915) 32 I. C. 795.
2. (1897) 1 Q. B. 122.
3. (1901) 1 Ch. 77.
4. 58 Law Times 871.
5. (1900) 2 Q. B. 138.

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The Stenotyper Limited: *Hastings Brothers* v. *The Stenotyper, Limited* [1] was then remedied by amending the section renumbered 44 so as to include expressly payments made to a creditor with a view to prefer his surety. A similar amendment would no doubt have been made to meet the case of payments to the surety himself with this view, if it had not been considered that they were already within the section as construed in these two cases. Such payments are even more objectionable than payments to the creditor as they do not directly reduce the indebtedness of the estate.

We accordingly answer the question in the affirmative.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir John Wallis, Kt., Chief Justice.

Bagiammal In re.

Bagiammal and another .. *Petitioners* * (*Plaintiffs*)

Civil Procedure Code, S. 24—Small Cause Suit—Transfer to City Civil Court—Power of the Chief Justice of the High Court—Madras City Civil Court Act (VII of 1892) Ss. 3 and 5 (2)

A suit pending in the Small Cause Court can be transferred to the City Civil Court only when the Chief Justice of the High Court directs the City Civil Judge to try the case in his capacity of Small Cause Court Judge.

Petition praying that in the circumstances stated therein and in the affidavit filed therewith, the Hon. Chief Justice will be pleased to order that the City Civil Judge, Madras may try Small Cause No. 998 of 1916 on the file of the Court of the Small Causes, Madras, transferred to him as per order dated 4-10-16 on C. M. P. No. 2446 of 1916, along with Original Suit No. 277 of 1916, the connected suit pending in the City Civil Court, Madras.

N. Swaminatha Aiyar, Vakil for the Petitioners.

The Court made the following

Order:—S. 24 of the Civil Procedure Code only authorises transfer to a Court competent to try the case. The City Civil Court is not such a court (S. 3 of the City Civil Court Act)* and I do not think S. 24 (4) of the Code of Civil Procedure makes it so.

* 3. The Local Government may, by notification in the official Gazette, establish a court, to be called the Madras City Civil Court, with jurisdiction to receive, try and dispose of all suits and other proceedings of a civil nature not exceeding two

* C. M. P. No. 334 of 1917. 7th February, 1917.

1. (1901) 1 Ch 250.

It can only become so by the Chief Justice of the High Court authorising the City Civil Judge to try the case in his capacity of Small Cause Court Judge under S. 5 (2) of the City Civil Court Act.

Bagiammal
In re.

I so direct him.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present.—Mr. Justice Abdur Rahim and Mr. Justice Spencer.

Swaminatha Aiyar ... *Appellant (Plaintiff),*

v.

Srinivasa Aiyar and others .. *Respondents (Defendants)*

Swaminatha Aiyar *v.* Srinivasa Aiyar.

Trust—Promissory note by trustee—Money borrowed for purposes of trust—Liability of trust estate.

Where a trustee borrows money for purposes of the trust by executing a promissory note, the creditor is not entitled to a decree charging the amount due under the promissory note against the trust property.

Strickland v. *Symons* [1], *In re Johnson, Shearman* v. *Robertson* [2] Referred to.

Srimat Devasikamani Pandarasannadhi v. *Noor Mahomed Rowthen* [3] not followed.

Second appeal against the decree of the Court of the Subordinate Judge of Tanjore in A. S. No. 87 of 1914 preferred against the decree of the Court of the District Munsif of Tiruturaipundi in O. S. No. 346 of 1912.

C. V. Ananthakrishna Aiyar for the Appellant.

T. R. Venkatarama Sastri and *S. Viswanatha Aiyar* for the Respondents.

The Court delivered the following

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thousand five hundred rupees in value arising within the City of Madras, except suits or proceedings which are cognizable,—

(a) by the High Court as a Court of Admiralty or Vice-Admiralty or as a Colonial Court of Admiralty, or as a Court having testamenatry, intestate or matrimonial jurisdiction, or,

(b) by the Court for the relief of insolvent debtors;

(c) by the Small Cause Court;

5. (2) Every such Judge shall be liable to perform any duties of a Judge of the Small Cause Court which the Chief Justice of the High Court may require him to perform.

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* S. A. No. 2155 of 1914. 2nd November 1916.

1. (1881) 26 Ch. D. 245. 2 (1880) 15 Ch. D. 548.
3. (1907) I. L. R. 31 M. 47.

Swaminatha Aiyar *v.* Srinivasa Aiyar.

Judgment.—The appeal has been argued before us on the basis that the 1st defendant at the time when the promissory note in question was executed by him was a trustee of the temple concerned in the suit. The 2nd defendant was appointed trustee about 2 years before the institution of the suit. The plaintiff has obtained a personal decree against the 1st defendant. But he says that he is also entitled to a decree as against the temple property, that is to say to a direction that the amount due to him may be obtained out of the trust property. But the lower Courts have held that inasmuch as the 1st defendant did not sign the promissory note as manager all that the plaintiff was entitled to was a decree against him personally. The suit as framed however appears to be not merely on the basis of the promissory note but also for debt and issues were framed raising the questions whether the debt was contracted for the benefit of the temple, whether the note was supported by consideration and whether the plaintiff was entitled to any relief against the trust property. If the plaintiff be entitled to any relief against the trust property, the mere fact that the 1st defendant in executing the promissory note did not sign as manager or trustee of the temple would not make any difference, for as we have stated the suit was not merely on the promissory note but also on the debt. This is a well recognised distinction and none of the cases which are cited in the judgment of the District Munsif can be said to have held otherwise.

But the difficulty in the way of appellant is that he is not entitled to any but a personal decree against the 1st defendant. He did not obtain any charge upon the temple property: all that he obtained was a promise on the part of the 1st defendant to pay the debt. The fact that the money was utilised and was intended to be utilised for the benefit of the temple cannot entitle the plaintiff to have a decree charging the amount due under the promissory note against the temple property. The law is clearly laid down by Lord Selbourne in *Strickland v. Symons* [1] and Sir George Jessel, Master of the Rolls in *In re Johnson, Shearman v. Robertson* [2]. In the first case, it is stated by Lord Selbourne "that there is no principle or authority for saying that if a trustee makes himself personally liable for goods, the creditor thereby obtains a lien on the trust property. There is not the least authority for such an action as the present. It is an

1. (1884) 26 Ch. D. 245. 2. (1880) 15 Ch. D. 548.

Swaminatha Aiyar v. Srinivasa Aiyar.

action for an equitable execution against the trust estate in respect of a judgment against the trustee. There is no evidence of any contract for any security on any part of that estate. There was only an ordinary contract for goods supplied to a person who happened to be a trustee." Here the liability arose out of the money borrowed by the trustee on a promissory note. That stands exactly on the same footing as if the debt was contracted for goods supplied for the benefit of the trust. Sir George Jessel, Master of the Rolls, also in the other case lays down the law practically in the same terms. In England however a distinction is made in cases where a certain specific trust property is set apart or ear-marked for the carrying on a business by a trustee. If in such a case, a debt is contracted by the trustee in the course of the business, it has been held that the creditor will be entitled to stand in the shoes of the trustee and to recover the money advanced, out of that particular fund. But even here there is a clear limitation to such a right expressed by a condition that a trustee himself should have a right of indemnity against the trust fund. If there was nothing due to the trustee, then as pointed out by the Master of the Rolls, the creditor can get nothing out of the trust fund. As regards the right of the creditor in an ordinary case where he lends money to the trustee or sells goods to him, there is no authority so far as one can gather from the English cases for the proposition that he is entitled to have his debt realised out of the trust property. This seems to be quite reasonable for supposing that at the time the creditor advanced the money, it was required for the benefit of the trust, still the trustee who borrowed might not be entitled to receive any money from the trust property, but on the other hand might be indebted to the trust. It would then be clear injustice to pass a decree making the trust property liable for the debt, the creditor having lent money on the personal security of the trustee. In India this view of the law was adopted in a Calcutta case *In the Matter of Shard* [1], by Mr. Justice Sale who followed the ruling in *Strickland* v. *Symons* [2], and *In re Johnson, Shearman* v. *Robertson* [3]. There is however a decision of this court *Srimat Devasikamani Pandara* v. *Noor Mahomad Rowthan* [4], where it was held that for debts contracted by the head of the mutt for purposes binding on the mutt, a decree in respect of

1. (1901) I. L. R. 28 C. 574.
2. (1884) 26 Ch. D. 245.
3. (1880) 15 Ch. D. 548.
4. (1907) I. L. R. 31 M 47.

Swaminatha Aiyar v. Srinivasa Aiyar

such debts may be passed against his successor charging the income of the mutt property, though such debts were not expressly charged on the income of the mutt. This decision may perhaps be explained as suggested by the learned pleader for the respondents, on the ground that according to the then prevalent view as to the legal right of the head of a mutt, the succeeding matathipathi might be regarded as being in the position of an heir to the last head of the mutt. That does not however, it must be admitted, appear to be the ratio of the decision in *Srimat Devasikamani Pandara* v. *Noor Mahomad Rowthan* [1]. The learned Judges proceeded on a dictum of their Lordships of the Privy Council in *Kunwar Doorganath* v. *Ramchunder Sen* [2] that a trustee of a temple occupies a position similar to that of a guardian towards an infant. But the case in the Indian Appeals was one in which the validity of alienations was in question and the analogy which was drawn in that case between the trustee of a temple and the guardian of an infant could not have been intended to convey that the right of a creditor who lent money to a trustee of a temple on personal security stood on the same footing as the rights of a creditor lending money to the guardian of an infant. The question whether a debt which is contracted by a trustee on his own personal security although for purposes of the trust can be made a lien on the trust estate does not appear to have been fully argued before the learned Judges in 31 Madras and none of the cases to which we have been referred were brought to their notice. The law as laid down in the two English cases referred to above as well as in 28 Cal. 574 is clear; and if a different view is taken in 31 Madras, we venture to think with all respect that it is not correct.

Mr. Ananthakrishna Aiyer suggested that we might order an enquiry as to whether the 1st defendant was entitled to receive any money from the temple and if so a decree might be given making the temple property liable for the plaintiff's debt to that extent. But there was no allegation whatever in the plaint nor was any question raised by the issue that the temple was indebted to the 1st defendant. We do not think that it would be the right course in this suit to order any such enquiry as has been

1. (1907) I. L. R. 31 M 47. 2. (1876) L. R. 4 I. A. 52=I L R. 2 Cal 341.

suggested. It may be that Mr. Anantbakrishna Aiyer's client has a remedy by a suit properly framed against the trust property if as a matter of fact the trust property is liable to the 1st defendant on a proper account being taken.

Swaminatha Aiyar v. Srinivasa Aiyar.

The appeal fails and must be dismissed with costs.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Ayling and Mr. Justice Srinivasa Aiyangar.

Kavanoor Velayuda Reddi and others ... *Appellants* * (*Defendants 23 to 31.*)

v.

Reddyvari Narasimha Reddy and others ... *Respondents* (*Plaintiff and Defendants 1 to 22.*)

Velayuda Reddi v. Narasimha Reddi.

Mortgage—Priority—Execution of mortgage bond for moneys due under earlier mortgage, without imposing fresh liability on mortgagor—Endorsement on first bond that it was cancelled—No extinction of security—Rights under first mortgage kept alive against mesne incumbrancers—Suit on mortgage as varied by subsequent bond—Part-payment by mortgagor—Effect of, against mesne incumbrances.

In 1882 A. mortgaged 4 villages to B. for Rs. 25,000 payable on demand with interest at 9 P.C. per annum. In 1888 A. again mortgaged to B. the same 4 villages and 2 others to secure the sum of Rs. 39,791 then due on the previous mortgage, agreeing to pay the principal on 30-12-1893 with interest at 6% per annum. At the same time an endorsement was made on the first mortgage that as a separate deed was executed for the principal and interest due on that instrument it was cancelled. Meanwhile, on 24-9-1887 A. had mortgaged 3 of the villages comprised in the first mortgage to C. who instituted a suit on his mortgage, obtained a decree, and purchased the villages in court-sale. To these proceedings B. was not a party. In 1900 and 1903, there were small payments by A. towards the principal amount due to B. In 1903, plaintiff. and assignee of B's. mortgage brought a suit on the mortgage both against A and C

Held that the mortgage of 1882 was not extinguished and therefore, C was not entitled to priority over the plaintiff. The effect of the mortgage of 1888 was merely to substitute a covenant to pay the mortgage money in 1893 for the earlier covenant to pay it on demand and to lower the original rate of interest, without in any way affecting the security for the payment of the mortgage money. The endorsement on the first mortgage bond did not operate as a release of the security under it.

Held also, that the plaintiff's suit not being based on the mortgage of 1882, but on that mortgage as varied by the subsequent agreement of 1888 and there being only one covenant to secure the payment of the debt, *viz.*, under the later

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* A. S. No. 418 of 1914. 11th September 1916.

Velayuda Reddi v. Narasimha Reddi.

mortgage, the payments towards principal in 1900 and 1903 by the mortgagor had the effect of saving plaintiff's suit from the bar of limitation. A mere change in the form of indebtedness, in the mode or time for payment, a variation of the rate of interest or the giving of additional security is not enough to rebut the presumed intention to retain the mortgage security when it is to the interest of the person who is entitled either to extinguish the security or keep it alive, so to keep it alive.

An agreement between the mortgagor and the first mortgagee extending the time for payment of the mortgage amount in no way impairs the security even as against the subsequent incumbrancers, for the junior encumbrancer is not a surety for the mortgagor. But no agreement between the mortgagor and the first mortgagee can prejudicially affect the rights already acquired by the junior encumbrancer under his mortgage unless he was a party to the agreement or unless his mortgage itself contains a power to the mortgagor to enter into such an agreement.

Appeal against the decree of the Court of the Subordinate Judge of North Arcot in O. S. No. 64 of 1913.

C. V. Ananthakrishna Aiyar for Appellants.

The Advocate General, V. Ramesam, C.P. Ramaswami Aiyar, T. Ramachandra Rao and *A. Doraisami Aiyar* for Respondents.

The Court delivered the following

Srinivasa Aiyangar, J.

Judgments :—*Srinivasa Aiyangar, J*:—This is an appeal by defendants 23 to 31 and the question for decision is whether their mortgage lien has priority over that of the plaintiff.

On the 8th July 1882 the then Rajah of Karvetnagar and his son Rajah Bomma Raja Bahadur mortgaged to one Subbamma four villages belonging to them to secure the repayment of Rs. 25,000 borrowed by them from her, and interest thereon at 9 per cent per annum. They agreed to pay interest every year and interest on overdue interest at the same rate and to pay the principal on demand.

On the 15th December 1888 Rajah Bomma Raja Bahadur who had become the Rajah on his fathers's death mortgaged to Subbamma the same four villages and two others in addition, to secure the sum of Rs. 37,791 then due on the previous mortgage and agreed to pay interest at the reduced rate of 6 per cent per annum for the future and to pay the principal on the 30th December 1893. The plaintiff is the assignee of the mortgage.

In the meantime on the 24th September 1887, the same mortgagor had mortgaged three of the four villages comprised in the first mortgage to the ancestor of defendants 23 to 31 to secure a sum of Rs. 18,336-6-6 and interest thereon at 6 per cent per annum. The mortgage money not having been paid on the due date the mortgagee sued the mortgagor, obtained a decree and

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purchased the villages in court-sale. To these proceedings Subbamma was not a party.

When the mortgage of 1888 was executed, an endorsement was made on the first mortgage instrument to the effect that as a separate deed was executed for the principal and interest due on that instrument it was cancelled and returned. This is signed by the treasurer of the mortgagor. The mortgage document was however retained by the mortgagee and was produced by the plaintiff along with his plaint.

In these circumstances two points were raised on behalf of defendants Nos. 23 to 31. First of all it was said that the mortgage of December 1888 extinguished the previous mortgage and that therefore their mortgage of 1887 which was prior in date had priority. The decision of this Court in *Mahalakshmi* v. *Sriman Madhava Siddanta* [1] and that of the Judicial Committee in *Mahomed Ibrahim Hussain Khan* v. *Ambica Prasad Singh* [2] on which the appellants relied for another purpose are against this contention. It is now well settled that a mere change in the form of indebtedness, in the mode or time for payment, a variation of the rate of interest, or the giving of additional security is not enough to rebut the presumed intention to retain the mortgage security when it is to the interest of the person who is entitled either to extinguish the security or keep it alive, so to keep it alive. (See Jones on Mortgages, S. 294). A considerable number of instances illustrating the principle is found in a note to a case, *Dumell and Wife* v. *Terstegge* [3]. Unless the debt was actually paid or the security expressly released the mortgage is not extinguished. The endorsement on the first mortgage instrument on which stress was laid does not operate as a release of the security and there was no payment of the debt.

The effect then of the 2nd bond was merely to substitute a covenant to pay the mortgage-money on the 30th December 1893, for the covenant to pay on demand and to lower the rate of interest payable thereafter, without in any way affecting the security for the payment of the mortgage money. An agreement between the mortgagor and the first mortgagee extending the time for payment of the mortgage amount in no way impairs the security even as against the subsequent incumbrancers for the junior encumbrancer is not a surety for the mortgagor. It certainly does not as

1. (1911) I.L.R. 35 M. 642. 2. (1912) I.L.R. 39 C. 527.
3. 86 Ame. Dec. 466.

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against the mortgagor. (Jones on Mortgages S. 942; *Bank of Utica* v. *Finch* [1]. Black's Article on Mortgages in the American Cyclopædia page 1414; Ghose on Mortgages, page 466). Of course no agreement between the mortgagor and the first mortgagee can prejudicially affect the rights already acquired by the junior encumbrancer under his mortgage unless he was a party to the agreement or unless his mortgage itself contains a power to the mortgagor to enter into such an agreement: for example no agreement after a second mortgage between the mortgagor and the first mortgagee, for an addition to the mortgage amount payable under the first mortgage by increasing the rate of interest or by adding interest to the principal when there is no provision for compound interest under the original terms, will affect the subsequent mortgagee. In this case it is not suggested that the agreement contained in the mortgage deed of 1888 in any way imposed a larger burden or an additional liability on the properties mortgaged to the second mortgagee. There is therefore no substance in this contention.

It is then argued that, assuming that the mortgage of 1882 was in full force when the 3rd mortgage of 1888 was executed, any right to enforce that mortgage at the time when this action was brought was barred by the law of limitation and the mortgagee has therefore lost his priority against the appellants; for this contention they rely on the authority of *Muhammad Ibrahim Hussain Khan* v. *Ambica Prasad Singh* [2], already referred to. The article of limitation applicable to the suit is article 132. The suit was instituted on the 2nd October 1913. The mortgage money on the terms of the first bond was payable on demand, and we assume that the money was payable on the date of the bond that is, the 8th of July 1882, though that is by no means clear. See *Perumal Ayyen* v. *Alagirisami Bhagavathar* [3], *Nallakaruppa Goundan* v. *Kumaraswami Goundan* [4], *Vythialinga Nadan* v. *Narayanaswami* [5], and *Periyanna Goundan* v. *Muthuveera Goundan* [6].* On the 15th December 1900, that is, within 12 years from the date of the 3rd mortgage, a sum of Rs. 5 was paid towards the principal and interest due on the mortgage

1. 49 Amer. Dec. 175.
2. (1912) I. L. R. 39 C. 527.
3. (1896) I. L. R. 20 M. 245.
4. (1898) 8 M. L. J. 167.
5. (1897) 16 M. L. J. 364.
6. (1897) I. L. R. 21 M. 139.

* [Cf. *Narna* v. *Ammani Amma*, I. L. R. 39 M. 981=31 M. L. J. 865. Ed.]

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by the manager of the mortgagors and a similar sum was paid on the 9th December 1903. The fact of the payment appears in the handwriting of the person making it and there is no question that the manager had authority to make these payments. It is not disputed that by these two payments the action is under S. 20 of the Indian Limitation Act set free generally and not merely against the mortgagor, nor is it contended that these payments were not payments towards the debt secured by the 1st instrument of mortgage, for as we have already held there is only one debt which is secured by both the mortgages. The contention is that the mortgage of 1888 though it may amount to an acknowledgment of liability by the mortgagor and thereby save the limitation against him under S. 19 of the Act, has no such effect against the mortgagee ; because an acknowledgment under S. 19 it is said, unlike a payment under S. 20 is good only against the person acknowledging and those who derive their title under him, which, it is said, means a person who derives the title subsequent to and subject to that acknowledgment. For the last position the observations of Mookerjee J, in *Surjiram Marwari* v. *Braham Deo Prasad* [1] *etseq* are strongly relied on.

The obvious answer to this contention is that the mortgage money did not become due till the 30th December 1893 or at the earliest till the covenant for the payment of interest in the third mortgage was broken, for until then the mortgagee had no right to demand or to sue for the mortgage money. This is not a case where there are two covenants to secure the payment of a debt one under the mortgage of 1882 and another under the mortgage of 1888 but only one *viz.*, that under the later document which superseded the former; and so long as the latter covenant remained unbroken the mortgagee cannot demand or recover the mortgage money, *Bolton* v. *Buckenham* [2]. The mortgagee is not suing on the mortgage of 1882 as it stood when it was executed, as is assumed in the argument, but on that mortgage as varied by the subsequent agreement which agreement I have already held in no way impaired the security, as against the second mortgagee. The case in the Privy Council was different in its facts and the principle of law acted upon in that case is in no way inconsistent with my conclusion. In that case the facts were these :—First, there was a mortgage in favour of A. in 1874 which in the events that

1. (1905) 2 C. L.J. 337 at 343. 2. (1891) L. R. 1 Q. B. 278.

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happened became repayable in 1887. In February 1888 the mortgagor's representative borrowed from X the sum necessary to discharge A's debt and executed a mortgage of the same properties to X. A's debt was paid out of the sum so borrowed. In the meantime several encumbrances had been created by the mortgagor or his representative on the whole or portions of the properties mortgaged to A and X. X assigned his mortgage to the plaintiffs who sued to recover the money due to him by enforcing the charge on the 22nd September 1900, which was within 12 years from the due date under the bond to X; and claimed priority over the mesne encumbrances. Their Lordships held (a) that he was entitled to priority as he was subrogated to the rights of the first mortgagee (b) that by that subrogation he had the same rights as an assignee of the 1st mortgage and was entitled to enforce that mortgage according to its terms (c) that as an action to enforce that mortgage had became barred—they do not say the action is barred against the mesne mortgagees and not against the mortgagor—the rights under that mortgage could not be enforced (d) that that did not prevent the mortgagee from enforcing his own mortgage and recovering his mortgage money, but that gave him no priority. It will be seen at once that there was no alteration, or substitution of the covenant in the 1st mortgage by a later covenant as there was in this case, though an attempt appears to have been made to argue that there was, which on the facts of that case could not be made out. See *Muhammad Ibrahim* v. *Ambica Prasad* [1]. There were in fact two covenants in favour of the plaintiff one under the original mortgage to A of which he became the equitable assignee by subrogation on breach of which in 1887 he was at liberty to enforce the payment of the mortgage money within 12 years of that date as a first charge and another covenant under the document of 1888 in favour of X of which he became the assignee by actual transfer which he could have enforced only on its breach. It is to be noted that their Lordships do not say that the action against the mortgagor was one to enforce the 1st mortgage as modified by the subsequent deed as that would not be correct on the facts of that case. The present case is like that in *Barnashi Pershad Chowdhri* v. *Johori Lal* [2] which was referred to and distinguished by the High Court at Calcutta in

1 (1912) 15 C. L. J. 414. 2. (1904) 8 C. W. N. 385.

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the case in which their judgment on this point of limitation was confirmed by the Privy Council. It is on this principle that Mookerjee, J. finally rested his judgment in *Sarji Ram* v. *Brahmadeo* [1] for he came to the conclusion that although a suit on the first mortgage if unaffected by any agreement between the mortgagor and the first mortgagee would be barred, in asmuch as there was an agreement or arrangement between them for the discharge of the debt so long as that arrangement lasted or the agreement remained unbroken, the first mortgagee could not sue and there was a suspension of remedy and the action was not barred. The actual decision in that case is against the appellants.

There are cases in which actions have been brought and decrees obtained on the first mortgage, and moneys raised on the mortgage of the same properties to pay off the decree. In these cases it has been held that the mortgage executed to pay off a first mortgage decree had priority over encumbrances created before its date and after the date of the 1st mortgage. *Perumal Chund* v. *Venkatasubbarayulu* [2] *Surjiram Marwari* v. *Brahmadeo Prasad* [1] *Mahalakshmammal* v. *Sriman Madhva Siddhanta* [3]. In these cases under the processual law of India there is no means of enforcing the first mortgage by another suit, and in an action brought under the later mortgage priority has been given over mesne encumbrances though as an equitable assignee of the rights of the 1st mortgagee, the later mortgagee cannot bring an action on the 1st mortgage. In such cases it appears to be difficult to apply the principle of assignment so as to treat the later mortgagee as assignee of the 1st mortgagee and view his action as one on the 1st mortgage and apply the law of limitation. It may be that in those cases also as there is only one covenant to pay the mortgage money, that is, under the later mortgage, as the covenant under the previous mortgage has merged in a judgment, the cause of action to recover the mortgage money will arise only on the date fixed for payment in the later mortgage and so long as that action is not barred the priority is not affected. In *Mahalakshmammal* v. *Sriman Madhva Siddantha* [3] the learned Chief Justice makes the significant observation: "The plaintiff gave up his rights to sue on his mortgage of 1895 but he did not give up his rights as a secured creditor which would

1. (1905) 2 C. L. J. 202. 2. (1897) I. L. R. 20 M. 486. 7 M. L. J. 198.
3. (1911) I. L. R. 35 M. 642.

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of course include the right to set up his security as against the puisne encumbrances." The suit was on a mortgage of 1903 executed to the plaintiff in discharge of a judgment obtained by him on his mortgage of 1895. Any suit on the mortgage of 1895 if one such could be instituted would be barred on the date when the subsequent action was brought, but the priority was held not affected. In this view it is unnecessary to consider the difficult question of the effect if any, of the acknowledgment of the mortgagor against the previous junior encumbrancer. We may however point out that the other learned Judge who took part in the decision in *Surji Ram Marwari* v. *Brahmadeo Prasad* [1] did not agree with Mr. Justice Mookerjee on the point, that in *Krishna Chandrasaha* v. *Bairab Chandra Saha* [2] Maclean C. J. and Mitra, J. took a different view and the latter case was followed in this Court by Benson and Sundara Aiyar, JJ. in *Velayudam v. Vythialingam* [3]. It is no doubt true that in the last case the difference between an acknowledgment and part-payment was not discussed though the language of S. 19 was adverted to. However as I have said before, it is unnecessary to express any opinion on that question in this case.

In the result the appeal must be dismissed with costs.

The decree as it stands may be treated to be a personal decree against defendants. This is not right as a suit on the covenant is now barred and, as against the mesne encumbrancers and subsequent purchasers, such a decree could not be passed. The decree will be modified accordingly.

Time is extended to six months.

Ayling, J.:—I agree.

A. V. V.

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1. (1905) 2 C. L. J. 337. 2. (1905) I. L. R. 32 C. 177

3. (1912) 24 M. L. J. 66.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir John Wallis, Chief Justice, and Mr. Justice Napier.

Kailasam Pillai ... *Appellant* in Appeal No.* 317 *of* 1913 (*2nd Plaintiff*).

v.

Nataraja Tambiran and others ... *Respondents in Appeal No.* 317 *of* 1913 (*Defendants and 1st Plaintiff*).

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Religious endowments—Mutts—Mutadhipati, ex-officio trustee of temples—Power of appointing a junior—Appointing a person as junior to secure his own position—Appointment bad—Limitation Act, Article 120—*Right to remove a trespasser, Matadhipati, when accrues—Powers of compromise of a trustee of public religious and charitable trusts.*

Where a Mutadhipati succeeded to the headship of the Mutt in 1893 under a will alleged to have been executed by his predecessor and also an alleged abhishekam and his title to headship was subsequently disputed by the 1st defendant in the suit, another Thambiran of the mutt who claimed to be appointed as a junior by that predecessor and alleged that the will and the abhishekam were false and they agreed in 1894 to compromise their differences by the first defendant recognising the position of the other as Mutadhipati and the latter for the purpose of obtaining the advantage of securing his own position appointed the first defendant as junior Pandara Sannadhi in exercise of the power of appointment incident to his office, and the Mutadhipati died in 1902 and the 1st defendant succeeded him under the appointment of 1894.

In a suit of the year 1905, under Section 539 of the Civil Procedure Code to remove the first defendant from the headship of the mutt and trusteeship of certain temples, which he held by virtue of his office as Pandara Sannadhi and for the appointment of a proper trustee, *held*, the appointment of the first defendant as junior in 1894 was an invalid appointment as it was made by the head of the Mutt in furtherance of his own interests to secure his position.

The suit is not barred by limitation under Article 120 of the Limitation Act as no suit could be brought against the 1st defendant to dispute his right before 1902, when he succeeded to the headship of the mutt.

Per the Chief Justice. The transaction of the year 1894 by which the 1st defendant was appointed as junior was of a highly objectionable character and the Court cannot countenance it even after a great length of time, on the ground that it was considered to be for the benefit of the institution in the sense that it put an end to disputes, between rival Thambirans.

It cannot be justified on the analogy of a family settlement, because agreements as to filling up a religious office of importance in the eyes of Hindu worshippers raise very different considerations.

The position of a Chinna-pattam is analogous to that of an ordinary reversioner with a mere *spes successionis* dependent on his surviving the Pandara Sannadhi; until he succeeds to the office, there can be no duty to question the right to succeed and any attempt to do so by a declaratory suit would probably fail.

Per Napier, J. A trustee of a religious and charitable trust has in respect of a litigation not affecting the office, the same right of compromise that an ordinary

* A. Nos. 317 and 318 of 1913. 5th December, 1913.

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trustee has; and a compromise even of conflicting claims to an office is not necessarily unlawful or opposed to public policy; but must be scrutinised by the Court before which it is pleaded for the purpose of ascertaining whether it is in violation of the trusts of the institution or affects absolutely the interests of the religious public.

A Chinna pattam can be removed for mis-conduct and so his right of succession is not absolute. Further the position of Chinna-pattam is one of greatly inferior sanctity and importance. So the right to sue to remove a person from the office of Pandara Sannadhi under Article 120 of the Limitation Act vests in the persons entitled to sue on the occasion of his taking that office, though the right to remove him from the office of Chinna-pattam vested at the time of the appointment to that office.

Appeals against the Decrees of the Court of the Temporary Subordinate Judge of Ramnad at Madura in Original Suits Nos. 17 and 18 of 1912.

The facts are fully stated in the judgments.

A. Krishnaswami Aiyar and *C. A. Seshagiri Sastri* for the Appellants :—The circumstances attending the appointment by Thandavaraya of the 1st defendant as junior clearly show that the main intention or purpose of the appointment was to secure his own position as Pandarasannadhi and not in furtherance of the end or purpose for which the appointment is intended, namely to carry on the spiritual work of the institution. (The vakil then adverted to the various circumstances referred to in their Lordships' judgments). In respect of the power of appointment of a successor, vested in a Matathipathi or trustee for the time being the Matathipathi is in the position of a fiduciary donee of a power. It is settled law even in the case of an ordinary power of appointment, if the intention or the purpose of the appointment is to secure benefit to the appointer, the appointment is fraudulent and invalid in the eye of the law; the appointment need not be for the sole and exclusive benefit of the appointee. Even an admixture of another intention or purpose would render the appointment invalid; there is no necessity of even a bargain. *Vatcher* v. *Paull* [1], *Molyneux* v. *Fletcher and Clark* [2], *Duke of Portland* v. *Topham* [3], *Askham* v. *Barker* [4], *In re Cohen* : *Brookes* v. *Cohen* [5], and *In re Perkins* : *Perkins* v. *Bagot* [6]. The duty is all the greater in the

1. (1915) A. C. 372 at p. 378.
2. (1898) 1 Q. B 648, 654.
3. (1864) 11 H. L. C. 32 : 11 E. R. 1242, 1250-52.
4. (1850) 12 Beaven 499 : 50 E. R. 1152.
5. (1911) 1 Ch. 37.
6. (1893) 1 Ch. 283.

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case of a fiduciary donee of power. *Thacker* v. *Key* [1], *Weller* v. *Ker* [2] and the Court will be all the more stringent in a case where the object or purpose of the power is not to benefit object A. or object B. but to further the interests of a public institution. I rely on the statement of the law by the Privy Council in *Ramalingam Pillai* v. *Vythilingam Pillai* [3]. The principle is of universal application and does not rest on any technicality of the English Law of powers. It has been applied to cases where a corporation exercises its statutory power for a collateral purpose. Maxwell's Interpretation of Statutes, p. 207. That principle is of a general application had been recognised in *Rangappa Naik* v. *Kamti Naik* [4] and *Danakoti Ammal* v. *Balasundara Mudaliar* [5].

In the case in *Ganapathi Ayyar* v. *Sri Vedavyasa Alasinga Bhattar* [6] the High Court deprecated an appointment by a Committee of a certain person as trustee in consideration of his contributing to the repairs of the temple.

The appointment cannot rest on any theory of compromise. The first defendant is not now tracing his title to Chinna Arumuga. He is relying solely on his appointment by Thandavaraya. The appointment by Thandavaraya can only be a distinct title by itself and it cannot have any reference to the first defendant's rights if any by reason of any appointment as junior by Chinna Arumuga. Besides, any compromise of rights with regard to an office and *a fortiori* of the headship of a public institution is invalid in law, and cannot confer any manner of right on the 1st defendant. *Subbarayudu* v. *Kotayya*, [7] *Sundarambal Ammal* v. *Yogavanagurukkul*, [8] *Mahadeo Prasad* v. *Bindeshri Prasad*, [9] *Arjun Dass* v. *Gunnendar Nath Basu Mullick* [10], *Kunhunni* alias *Ravi Varma Rajah* v. *Ramasubramania Pattar* [11], *Muhammed Ibrahim Khan* v. *Ahmad Saib Khan* [12], *Soudamani Ghose* v. *Gopal Chandra Ghose* [13]. A trustee has no right to purchase his right of trusteeship by means of a compromise. *Graham* v. *M. Cashim* [14], *Abdallah* v. *Rickards* [15].

1. (1869) 8 Eq. 408 at 415.
2. (1866) 1 L.R.H.L. Sc. 11 at p. 15.
3. (1893) I. L. R. 16 M. 490.
4. (1907) I. L. R. 31 M. 366 at 373.
5. (1911) I. L R. 36 M. 19.
6. (1906) I. L. R. 29 M. 534 at 538.
7. (1892) I. L. R. 15 M. 389.
8. (1914) I. L. R. 38 M. 850.
9. (1908) I. L. R. 30 A. 137.
10. (1914) 18 C. W. N. 1267.
11. (1916) 31 M. L. J. 783.
12. (1910) I. L. R. 32 A. 503 at 516.
13. (1914) 21 C. L. J. 273.
14. (1901) 1 I. R. 404.
15. (1888) 4 Times L. R. 622.

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The powers of compromise of a private trustee under S. 49 of the Trusts Act are confined to matters affecting the administration of the trust; and the powers of the trustee of a charitable or religious institution cannot certainly be wider.

Whether or not a right to an office can be the subject of a compromise, a trustee has no right to appoint another person as his successor as the result of a compromise or bargain. An appointment does not rest on the same footing as a legal adjustment of existing rights.

Even if the trustee has the right to make an appointment as the result of a compromise, the court has the power to look into the intention or purpose of the compromise. If the compromise is for a collateral purpose the court will treat it as void and of none effect. *Chidambaram Mudaliar* v. *Krishnaswami Pillai* [1] and *Arunachellam Chettiar* v. *Vellayappa Thambiran* [2]. (The learned vakil then argued that the appointment of the 1st defendant was revoked by Thandavaraya.)

The Hon. The Advocate General (*S. Srinivasa Aiyangar*) for the respondent:—The English law of powers is a misleading guide: and an artificial extension of the technical law of powers has been deprecated by the Privy Council.

The head of a public institution has plenary powers of compromise. See *Arunachellam Chettiar* v. *Vellayappa Thambiran* [2], *Nilakandan* v. *Padmanabha* [3]. The power of compromise is not confined to purely administrative matters as contended for by the other side. A right to an office can be the subject of compromise. See *Nilakandhan Nambudripad* v. *Padmanabha Ravi Varma* [4]. The point is concluded by the decision of this court in *Thiruvambala Desikar Gnanasambanda Pandaram* v. *Chinna Pandaram* [5]. The principle of the case in *Ramanathan Chetti* v. *Murugappa Chetty* [6] supports my contention; and the wide observations in *Sundarambal Ammal* v. *Yogavanagurukkal* [7] are not supported by any authority. The cases of wills referred to proceed on a special footing and even

1. (1914) 28 M. L. J. 285.
2. (1915) 28 M. L. J. 410.
3. (1890) I. L. R. 14 M. 153.
4. (1894) I. L. R. 18 M. 1=4 M. L. J. 233. (P. C.)
5. (1915) 30 M. L. J. 274.
6. (1906) I. L. R. 29 M. 283 P. C.
7. (1914) I. L. R. 38 M. 850.

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in the case of wills, there is nothing to prevent a caveator withdrawing his objections to a will as the result of a compromise, though the will has to be formally proved in a Court of probate.

There is no distinction in principle between a case where a dispute to the succession to an office is settled and where an appointment is made as the result of a compromise. The case in *Girijanund Datta Jah* v. *Sailajanund Datt Jha* [1] is a direct authority. *Damodar Das* v. *Lakhan Das* [2] and *Thiagaraja* v. *Ratnasabapathi Pillai* [3].

On the facts there can be no doubt that the compromise is in the best interests of the institution as it avoided a ruinous litigation and the consequent waste of Mutt funds. The court cannot review the nomination of the 1st defendant and investigate afresh as to whether he is or is not a fit person.

Even in regard to powers of appointment the reservation of a benefit to the appointor does not by itself render the appointment invalid, *Roach* v. *Trood* [4], *Re: Huish's Charity* [5] and a mixed intention does not render the appointment fraudulent. Fraud has to be strictly pleaded and substantiated, *Cloutte* v. *Story*, [6] *Cooper* v. *Cooper* [7], *Re: Turner's Settled Estate* [8], *Henty* v. *Wrey* [9].

In the present case there is not even an issue as to the alleged fraudulent nature of the appointment.

The other side has not kept in view the distinction between motive and intention. The motive of the appointment is immaterial and cannot vitiate the appointment. *Cooper* v. *Cooper* [7].

In any case, having regard to the lapse of time the court will not remove the trustee merely by reason of some irregularity in his appointment. *A. G.* v. *Clifton* [10], *A. G.* v. *Dangars* [11], *A. G.* v. *Cuming* [12], *A. G.* v. *Clapham* [13].

Further, the suit is barred by limitation, as the plaintiff cannot question the appointment, as it was more than 6 years after the appointment, *Jagan Nath Das* v. *Birbhadra Das* [14]. Article 120 of the Limitation Act applies.

1. (1896) I. L. R. 23 C. 645.
2. (1910) I. L. R. 37 C. 885.
3. (1910) 20 M. L. J. 421.
4. (1876) 3 Ch. D. 429 at 443.
5. (1870) L. R. 10 Eq. 5.
6. (1911) 1 Ch. 18.
7. (1869) L R. 5 Ch. A. 203.
8. (1884) 28 Ch. D. 205.
9. (1882) 21 Ch. D. 332.
10. (1863) 32 Beav. 596.
11. (1864) 33 Beav. 621.
12. (1843) 2 Y. and C. Ch. Cas. 139, 150, 151.
13. (1858) 10 Hare. 540.
14. (1892) I. L. R. 19 C. 776.

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In any event, the court will not split up the office and will not fill up the vacancy in regard to the temples as this court has already held that it cannot interfere so far as the mutt is concerned.

A. Krishnaswmai Aiyar in reply :

There is no force in the contention as to the splitting up of the office. The 1st defendant has not been adjudged to be a lawful Mutadhipathi and he cannot on that ground claim to be the trustee. The fact that a trespasser takes possession of mutt cannot give him the right to the trusteeship of temples ; nor can it oust jurisdiction of the court under S. 92 of the Civil Procedure Code.

There is no analogy between the cases where the court refused to interfere on the ground of irregularity and the present case where the appointment is *ab initio* void.

The suit is not barred by limitation. In the absence of any person who is lawfully entitled to the office, the first defendant cannot contend that he has acquired the office by adverse possession. For the running of time in favour of the 1st deft., there should be a person rightfully entitled to the office. *Palaniyandi Malavarayan* v. *Vadamalai Oodayan* [1].

There is no point in the contention that Article 120 applies and not Article 124. The starting point under the Act has to be judged with reference to the starting point under Article 124.

Even if the question has to be determined apart from adverse possession the plaintiff had no right to sue till the Advocate General granted sanction under S. 539 and the suit is in time. The public is a fluctuating body and consequently the right is a recurring one.

In any event, the position of the 1st defendant during the life of his predecessor was like that of a reversioner to a Hindu widow and no suit for a declaration of a right of the nature of a *spes successionis* can lie. *Manickam Pillai* v. *Thanickachellam Pillai* [2], *Janaki Ammal* v. *Narayanasami Aiyar* [3].

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1. (1912) 18 I. C. 873
2. (1916) 2 M. W. N. 87.
3. (1916) I. L. R. 39 M. 684.

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The Chief Justice.

The Court delivered the following

Judgments :—*The Chief Justice*:—These are appeals in two suits originally numbered Original Suits Nos. 1 and 2 of 1905 in the District Court of Madura brought with the consent of the Advocate-General under S. 539 of the Code of Civil Procedure by different plaintiffs. In Original Suit No. 1, the subject of Appeal No. 317, it was sought to have it declared that there was no lawful trustee of the Tiruvannamalai Mutt and of the dependent Devasthanams or temples, while in the second, the subject of Appeal No. 318, the declaration was only sought in respect of the Devasthanams or temples. The reason for filing the two suits was that it was considered doubtful whether the holder of the religious office of Pandarasannadhi of the Mutt was a trustee within the meaning of S. 539 of the Code of Civil Procedure. The case set up in the plaint was that after the death in May 1893 of Arumugam a former Pandarasannadhi one Tandavaraya took wrongful possession of the Mutt under a will which the Sub-Registrar and the District Registrar subsequently refused to register on the ground of forgery, and that shortly after the first defendant was appointed as his successor " out of fraudulent and sinister motive" and that the appointment was void. The first issue settled in both suits was, " whether the 1st defendant (the *de facto* incumbent of the office) is a mere trustee of the Mutt and has not got an estate for life in the Adhinam properties ? On the 14th March 1906 the District Judge dismissed both suits holding, on the authority of *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami* [1] that the Pandarasannadhi was not a mere trustee and that no suit lay for his removal under Section 539, either as regards the Mutt or the trusteeship of the Devasthanams which in his opinion went with it. When the case came before Munro and Abdur Rahim, JJ. on appeal, they held that in any case there was no reason why the properties belonging to the Devasthanams which the 1st defendant admittedly held in trust should not be protected if it were proved that the defendant had been guilty of waste and mismanagement as alleged or why if a proper case was made out the Court should not make the necessary provision for a proper administration of the trust. They accordingly allowed Appeal No. 90 of 1906 in Original Suit No. 2 of 1905, and adjourned the

1. (1904) I. L. R. 27 Mad. 435.

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other Appeal No. 91 of 1906 in Original Suit No. 1 of 1905 pending the answer to a reference which they made to the Full Bench nearly in the terms of the first issue, "does the head of a Mutt hold the properties constituting its endowment as a life-tenant or as a trustee?" The Full Bench answered that he was not a trustee except in so far as it might be shown that he held any particular properties on trust. At the same time they refused to regard him as a life-tenant.* When the case went back to Munro and Abdur Rahim, JJ., they stated that the reply was that in the absence of evidence to the contrary the head of a Mutt is not a trustee. They accordingly reversed the decree of the District Court in this suit also, and remanded it for disposal according to law.

The two cases after remand were transferred to the file of the Temporary Subordinate Judge of Ramnad and numbered in that Court 17 and 18 of 1912 and they were tried together with a third suit No. 19 of 1912 brought by one Ponnambalam for a declaration that he had been duly elected to the vacant office of head of the Mutt by the *thambirans* or disciples. This suit was dismissed and the dismissal has become final as no appeal has been filed.

As regards the Original Suit No. 1 of 1905 the Subordinate Judge found that there was no evidence to the contrary to show that the Pandarasannadhi was a trustee, and he accordingly held that the suit was liable to dismissal on this ground. No attempt has been made to question his finding on the evidence; but it is contended that the decision of the Full Bench is opposed to the recent decision of the Privy Council in *Ram Parkash Das* v. *Anand Das* [1]. This is strongly contested on the other side, but we do not propose to go into this question, as we consider that the point has already been decided in this suit by a Bench of this Court in the former appeal, and that the proper way of questioning it is by appeal from that decision.

The third issue in both suits was "The plaintiffs suing the 1st defendant as a trespasser, is the suit maintainable under S. 539 of the Code of Civil Procedure?" We agree therefore with the Subordinate Judge that as regards Original Suit No. 1 of 1905 (17 of 1912) this must be answered in the negative and the suit

* See 19 M. L. J. 778 : 33 Mad. 265.

1. (1916) I. L. R. 43 Cal. 707=31 M. L. J. 1. (P. C.)

must be dismissed in so far as it relates to the office of Pandarasannadhi and its endowments.

As regards the second suit O. S. No. 2 of 1905, now 18 of 1912, the defendant's pleader did not press this issue at the trial and it was accordingly found for the plaintiffs, and the suit was held to be maintainable under S. 539 as relating only to the Devasthanam properties. It still involves the question whether the 1st defendant is the lawful Pandarasannadhi as, if he is not, he has no right to the trusteeship of the Devasthanams, and those interested in these charities have a right to sue to have proper provision made for the trust. The Subordinate Judge has accordingly gone into the question of the validity of the 1st defendant's appointment and has found that it is not open to objection and we have now to deal with that finding on appeal.

It is unnecessary to summarise the numerous descriptions of this office which are to be found in the decisions of this Court. The evidence shows that, as in the case of other similar Mutts, the Pandarasannadhi for the time being nominates one of the disciples who have received initiation as sanyasis or ascetics to succeed him on his death and confers upon him *abishegam*, a sort of ordination, which, as appears from the evidence in this and other cases, is regarded as having the effect of deification and also empowers him to initiate disciples as sanyasis. During the life-time of the Pandarasannadhi his successor in this Mutt is said to fill the office of Chinna-pattam. When the nomination is made at the point of death it is not unfrequently made by will as well as by conferring *abishegam* where possible, the will being intended to evidence the exercise of the power of appointment.

In the plaint as already stated the plaintiffs attacked the 1st defendant's appointment on the ground that Tandavaraya under whom he now claims was not himself the lawful Pandarasannadhi and also on account of the circumstances under which the 1st defendant's appointment was made.

This last question though distinctly raised in the pleadings was not, to say the least, very clearly taken in the issues in these two suits, but it was the subject of the fourth issue in the third suit which was tried with them :—Whether the appointment of the 1st defendant to the Chinna-pattam by the late Pandarasannadhi 'was made *mala fide* to serve his own purpose, and therefore invalid?" It is, I think, clear that the parties in these two suits also

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went to trial on this issue, and that we are bound to deal with it. At the hearing in the lower Court it was admitted that Tandavaraya was the lawful head of the Mutt and the case must be dealt with on that basis. It is still however necessary to refer to the circumstances under which he was appointed in so far as they affect the nomination of the 1st defendant as his successor. As already stated Arumugam the former head died suddenly in May 1893 six months after he had been acquitted on a charge of murder. In the proceedings taken for the registration of his alleged will evidence was given that he regarded Tandavaraya one of the Tambirans or disciples of the Mutt as responsible for his prosecution. On his death this Tandavaraya entered on the office under an alleged appointment by the deceased both by will and abishegam shortly before his death. It appears that some suspicion of foul play was entertained and that aninvestigation was held by the Sub-Magistrate, as one of the reasons given by the District Registrar in Exhibit D for refusing to register the will was that no mention was made of it by Tandavaraya during this inquiry. The result of the inquiry would appear to have been that there was no ground for taking action against any one. The 1st defendant was away at the time, and when he returnel to the District he did not return to the Mutt but went to live under the protection of the Zamindar of Sivaganga who also refused to recognise Tandavaraya and joined with him in opposing the registration of the will put forward by Tandavaraya. On the 11th June 1893 the 1st defendant presented a petition Exhibit M to the District Court and another Exhibit U to the District Registrar, and two days later he published notices in the District Gazette and the Madura Mail and circulated a notice to the public Exhibits H, H1 and H2 in which he claimed that he had been appointed to the Chinna-pattam by the late Pandarasannadi and was entitled to succeed and that the will put forward by Tandavaraya was a forgery. In the petition to the District Judge he also accused Tandavaraya of murdering the deceased. A perusal of the District Registrar's judgment (Ex. D) delivered after an elaborate investigation in which both sides were represented by prominent practitioners shows the very serious difficulties which Tandavaraya would have had to face if he had been called upon to substantiate his claims to the succession in a Court of Law by proving the execution of the will. It was in these circumstances that certain persons intervened to bring about a compromise between the 30th

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April 1894 the date of the judgment and the 2nd July 1894 when Exhibit L was executed. The evidence shows that the compromise was mainly brought about by three persons whose respectability has not been questioned. The 1st defendant was first induced to leave the entourage of the Sivaganga Zamindar and go to Madura and after the terms had been settled he returned to the Mutt where Tandavaraya and he executed Exhibit L. The document recites that Tandavaraya had duly succeeded and was in possession, that the 1st defendant had been asserting that he himself had been appointed, and that for the past year they had both been litigating about this and incurring much expense and putting the institution to much inconvenience, and that in the interests of the institution they had both settled the matter amicably on the terms that Tandavaraya was to be the Pandarasannadhi with all the rights of the office and that the 1st defendant was to be the Chinna-pattam or junior head and heir to Tandavaraya, and that during Tandavaraya's life-time the 1st defendant was to enjoy certain specified properties belonging to the Mutt without interference, and that during his life-time Tandavaraya was not to appoint any one as heir to the Chinna-pattam (*sic*).. Assuming what was conceded by the appellants in the lower Court for the purposes of the case that Tandavarya had been duly appointed, but assuming nothing more we have to deal with two questions: was this a good exercise by the holder of a public religious office of the power vested in him by the usage of the institution to appoint a successor during his life-time and secondly, is it now not open to question as having been one of the conditions of a *bona fide* settlement of doubtful claims effected in the best interests of the institution? It will be convenient to deal with the latter question first, as it is contended that if the answer is in the affirmative it is conclusive. In matters like this, it is important to look at the substance rather than the form and the first question is whether this was really a compromise of doubtful claims, or an exercise by Tandavaraya of his power of appointment in the first defendant's favour with a view of escaping the very serious difficulties with which he would be confronted if called upon to prove his own appointment in a Court of Law at the instance of the 1st defendant. That the 1st defendant's counter-claim by virtue of a prior appointment was of a most unsubstantial character appears from his cross-examination on which the Subordinate Judge has commented and may be gathered from his written statement Exhibit E 1 in a subsequent suit in

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which he excused his conduct in contesting the will of the late Pandarasannadhi as due to bad advice, ill-feeling, and imperfect knowledge of the facts, and tacitly admitted that his own claim to the office under a prior appointment was without foundation. This claim of itself would never have caused Tandavaraya any uneasiness or afforded a ground for compromise, and on the most favourable view its abandonment formed a very small part of the consideration for the compromise. The substance of that compromise was that the 1st defendant was to abstain from putting Tandavaraya to the proof of his own appointment as Pandarasannadhi in consideration of being appointed his successor with immediate enjoyment of part of the Mutt properties. In consideration of a private advantage the first defendant was to desist from challenging as he had been doing till then Tandavaraya's claim to have been duly appointed to a public office of a religious character. The 1st defendant having practically no claim at all to this office and Tandavaraya having a claim which it is clear he would have had great difficulty in proving, they agreed to compromise their differences by dividing the enjoyment of the office on the terms that Tandavaraya was to hold it for life and the 1st defendant after him. It was in fact not a *bona fide* settlement of doubtful claims at all, but an arrangement of a very different character by which Tandavaraya agreed to exercise a power of appointment incident to the office which he claimed for the purpose of obtaining an advantage for himself. In *Girijanund Datta Jha* v. *Sailajanund Datta Jha*[1] which is a case of the compromise of rival claims to succeed to a religious office the sole consideration on either side was the abandonment of a *bona fide* claim on the other side and it is unnecessary to consider it further. Much time has been spent on both sides in taking us through a great number of English and Irish cases to show what will and what will not be upheld as the valid exercise of a power, but it is unnecessary to go into them. I find as a fact for the reasons already given that the appointment of the 1st defendant was made by Tandavaraya not in a *bona fide* settlement of rival claims, but in furtherance of his own interests; and that on that ground it was a bad appointment as held by their Lordships of the Judicial Committee in *Ramalingam Pillai* v. *Vythilingam Pillai*,[2]. In these circumstances I think it unnecessary to

1. (1896) I. L. R. 23 Cal. 645. 2. (1893) I. L. R. 16 M. 490.

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discuss the question how far such compromises can be supported. It is said and truly that this arrangement did not prevent other people from questioning Tandavaraya's right to the office and that the Zamindar of Sivaganga filed Original Suit No. 53 of 1895 in the Subordinate Judge's Court of Madura East contesting the validity of the appointment and claiming the right to appoint as on a vacancy, Exhibit E. The fact that Tandavaraya did not obtain complete security under this arrangement does not make it any the less objectionable. As a matter of fact the Zamindar did not prosecute the suit; possibly because his right to do so was questioned, Exhibit XXXII. There were not the same objections to a suit by the present 1st defendant as one of the Tambirans of the Mutt, and it was no doubt realized that it was of the first importance to buy off his opposition. Once this was done, opposition soon died down and Thandavaraya enjoyed the office for the rest of his days.

If this be the true nature of the transaction, it was of a highly objectionable character and the Court cannot countenance it even at this distance of time on the ground that it was considered to be for the benefit of the institution in the sense that it put an end to disputes between the rival Tambirans. It has also been contended that the compromise should be supported as a family settlement; as to this I cannot but think that agreements as to filling up a religious office of importance in the eyes of Hindu worshippers raise very different considerations and that the decisions as to family settlements are inapplicable. The question of limitation was not argued in the lower Court, but has been raised before us, and it has been contended that the suit is barred under Article 120 of the Indian Limitation Act. The position of the Chinna-pattam is analogous to that of an ordinary reversioner with a mere *spes successionis* dependent on his surviving the Pandarasannadhi who appointed him. Until he succeeds to the office there can be no duty to question his right to succeed and any attempt to do so by a declaratory suit would probably fail. We accordingly modify the decree of the Temporary Subordinate Judge by declaring that the 1st defendant is not the lawful trustee of the Devasthanams and the endowments and removing him from their management, and by directing the Temporary Subordinate Judge to appoint a fresh trustee of the Devasthanams, and by directing that the trustee so appointed be

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placed in possession. Costs of the plaintiffs in Appeal No. 317 of 1913 will come out of the Devasthanam's estate throughout. There will be no order as to costs in Appeal No. 318 of 1913.

Napier, J:—These are appeals in respect to two suits tried in the Court of the Temporary Subordinate Judge of Ramnad. They were brought by two sets of plaintiffs and with the sanction of the Advocate-General. In Appeal No. 317 of 1913 the plaintiffs asked for a declaration that one Nataraja Tambiran the present holder of the office of Pandarasannadhi of the Thiruvannamala Adhinam is not lawfully entitled to that office and also not entitled to be the trustee of the Anjukovil Devasthanam and the properties appertaining thereto. They therefore pray for his removal from these positions and the appointment of a new trustee for administration of the trust. In Appeal No. 318 of 1913 the plaintiffs confine the relief which they asked for to a declaration and removal from the position of trustee of the Devasthanam and its properties. The suits were tried together in the Subordinate Judge's Court and a third suit, which is unfortunately not before us, was tried with them and evidence taken in all the three suits—a procedure that has given rise to certain difficulties which will be dealt with later on. The position taken up by the defendant Nataraja Tambiran is stated in paragraph 13 of his written statement and is that one Thandavaraya Desikar who was the lawful Pandarasannadhi of the Mutt nominated him as his successor to the Adhinam with appropriate initiation and ceremonies on the 9th July 1894, that the late Pandarasannadhi died on the 16th March 1902 and that he himself succeeded to the headship and trusteeship of the Devasthanam. He raises other defences also which can be dealt with later on. The plaintiffs do not deny the nomination and initiation of the defendant as Chinna-pattam and successor by the late Pandarasannadhi, but plead that it was bad in law for the following reason, namely, that the appointment was not made with a sole view to the benefit which would accrue to the Mutt and to the disciples but with the object of getting rid of an opponent who was at the time both setting up a claim to be the lawful Pandarasannadhi and challenging the truth of the appointment and initiation of Thandavaraya himself. A further contention is raised by the plaintiffs that apart from the intention with which the appointment was made, it is illegal in that no valid appointment can be

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made by compromise of conflicting claims. The Advocate-General who appears for the defendant has contended that as long as the person appointed belonged to the class from whom the Pandarasannadhi is chosen, it is not for the Court to look into the circumstances of his selection. For this extreme proposition, there is no authority and it is clearly negatived by the decision of the Privy Council in *Ramalingam Pillai* v. *Vythilingam Pillai*, [1]. I am satisfied that it is our duty to examine the surrounding circumstances, not for the purpose of ascertaining the motive influencing the appointment, but to see whether the appointment was made with the object and intention of conferring a benefit on the Mutt and the disciples. The admitted facts are as follows:—one Chinna Arumuga Desikar was in the beginning of 1893 Pandarasannadhi of the Mutt. He died on the 23rd May of that year, and Thandavaraya Desikar at once claimed the succession, alleging that he had been initiated by the deceased on the day before his death and that the appointment had been confirmed by a will made on the same date by the deceased. His claim, in turn, was at once challenged by Nataraja Tambiran on two grounds, (1) that he had himself been appointed and (2) that the story of the initiation was false and the will a forgery. Thandavaraya presented the will for registration on the 23rd May 1893. The registration was opposed by Nataràja charging the forgery and making a further allegation that Thandavaràya had murdered the late Pandarasannadhi. An exhaustive enquiry was held by the Sub-Registrar who found the will to be a forgery and his decision was confirmed by the District Registrar on the 30th April 1894. On the 9th July 1894 Thandavaraya nominated Nataraja to the post of Chinna-pattam, a position which carried with it the right to succeed to the Pandarasannadhiship, and performed the necessary initiation ceremonies. It is argued by Mr. Krishnaswami Aiyar that the true inference to be drawn from these facts is that Thandavaraya felt himself in a position of grave danger in that the defendant might at any moment apply to the District Registrar for sanction to prosecute him for forgery and that the arrangement was one by which he bought off opposition to his claim, an opposition which had already acquired a very strong position. The Advocate-General has contended that this could not have been the intention because as well as Nataraja, he had

1 (1893) I. L. R. 16 Mad. 490.

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a strong opponent in the Zamindar of Sivaganga who was of course not affected by these arrangements and he could not hope to stifle action by the Zamindar and in fact did not do so, as the Zamindar brought a suit against him in the following year challenging his claim to be lawfully appointed. Mr. Krishnaswami Aiyar relies on the terms of the agreement (Exhibit F.) under which Nataraja was appointed Chinna-pattam with unusual and special rights and privileges. Now Exhibit F is signed by both parties and it recites that Thandavaraya was duly appointed Pandarasannadhi by Arumuga Desikar, the late Pandarasannadhi, and has taken possession of the office and its dignities. It further recites that Nataraja had gone away to Madura and other places on account of ill feeling but that he had returned in obedience to the order of the Pandarasannadhi and had been appointed Chinna-pattam and received *Abishegam* and now holds that office. It then provides that Thandavaraya is to remain in full possession and enjoyment of the office, and that Nataraja shall, as long as he holds the position of Chinna-pattam, be entitled to the possession of the Matam at Kumbakonam and the Matam at Mylapore attached to the Thiruvannamalai Adhinam and also to receive all the income of the villages mentioned in the schedule without any interference by the said Thandavaraya and that he shall manage the said Matams and the charities connected therewith. Thandavaraya is to conduct all the Matams attached to the said Adhinam other than those transferred to Nataraja without any kind of interference by the said Nataraja. And lastly Thandavaraya covenants not to appoint any one else to the office of Chinna-pattam as he has agreed that Nataraja shall succeed him to the Pandarasannadhiship. Now it must be conceded that this is an unusual arrangement. It is true that Thandavaraya remains Pandarasannadhi, but it is clear on the language of this document that there was an actual division of the temporal rights and possessions. The same language is used in the allocation of the properties to each and Thandavaraya reserves no more rights in the alienated properties than Nataraja has in the properties retained, so that it is not merely a case of grant of wide powers of management over certain selected Mutts and properties attached to them. As a matter of fact, Nataraja retired at once to Mylapore and lived there managing the properties, and the Judge has found that he actually allowed some of the Mutt properties to be sold for debts incurred by him. Another some-

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what suspicious circumstance is the haste with which this appointment was made. It is of course open to the Pandarasannadhi to appoint his successor at any time, but when the appointment is made little more than a year after the Pandarasannadhi succeeds to the office, that circumstance is one to be taken into consideration when the appointment is challenged to hav ebeen made with an improper object.

A considerable amount of oral evidence was let in on behalf of the plaintiffs to support their case and several witnesses speak to their own belief and to the rumours current that Thandavaraya was at the time in danger of prosecution. A good deal of it is, in my opinion, inadmissible. But plaintiffs' 6th witness speaks to something definite. He says that Thandavaraya asked him to compromise with Nataraja and stop the prosecution, that he went to Madura for this purpose, met Nataraja and asked him not to prosecute as it was a big matter and the prosecution would be a disgrace to both sides. He says that Nataraja agreed to drop the matter if he was appointed Chinna-pattam and an agreement was made under which he would be irremovable and have sufficient properties to maintain his position. As against this evidence there is the fact elicited from him in cross-examination that he did not himself effect the compromise and he admits that he never told any one about this matter. Plaintiffs' 18th witness too claims to have taken part in the preliminary negotiations, but as he was a witness to the will which was attacked as forgery, he is not perhaps a very reliable witness. Defendant's 6th witness makes an admission which is important considering that he was supporting the defendant. He states that Nataraja was disputing the will as a forgery and that after the refusal to register it he was intending to adopt further proceedings, but that one Ramasami Aiyar brought Nataraja from Madura and settled the disputes between him and Thandavaraya. Nataraja gives evidence himself as defendant's 13th witness. He was in a somewhat difficult position because he could not admit that his claim was false and at the same time he had to try and to minimise the circumstances attending the arrangement. What he does is to throw the whole blame for the position on the Zamindar of Sivaganga and to deny any knowledge of an attempt to obtain sanction against Thandavaraya. He does, however, make one unguarded admission, which is as follows:—" My objections to

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the registration of the will were all founded on facts." By the term "facts", he cannot, of course, mean anything else than that the will was a forgery. That, coupled with his persistence in the witness box in adhering to the story of his own initiation and appointment, gives no room for doubt that if he had not been satisfied with the arrangement made, he would have persisted in his claim to the Pandarasannadhiship in his opposition to the will as a forgery and even possibly in his charge of murder against Thandavaraya. I think it right to say here that there never was the slightest ground for suspicion of murder, but the attack on the will was very serious indeed. We are bound to presume that the Registrars applied their minds to the case, and they *had* come to a conclusion which placed Thandavaraya in a very difficult position. The will had been found against him in two exhaustive enquiries, in addition to which Nataraja was alleging an appointment in support of which he would doubtless be able to produce some evidence though I agree with the Subordinate Judge in his view that Nataraja's story of appointment is false. Nataraja in his written statement filed in the suit brought by the Zamindar of Sivaganga referred to above has endeavoured to evade responsibility. In that suit (O.S. No. 53 of 1895 on the file of the Court of the Subordinate Judge of Madura East), the Zamindar of Sivaganga claimed the right of appointment and asked for the removal both of Thandavaraya and Nataraja. Exhibit E 1 is the written statement of Nataraja. He there relies on his appointment as Chinna-pattam and states that he yielded to the instigation of the plaintiff (the Zamindar) and that owing to his own imperfect knowledge of facts he made certain allegations impeaching the will, but that when he understood the real facts and the bad motives of his advisers, namely, the plaintiff and his officers, he rejoined the Mutt which he had left under evil advice and in the position of a *disciple* was duly appointed Chinna-pattam. It is to be noted that he says not one word about his own appointment by Arumuga Desikar and admits that he was only a disciple at the time of his appointment by Thandavaraya. These facts and a number of circumstances of less importance have been examined before us by the learned Vakils and the inference sought to be drawn therefrom has been urged at great length and with great force by both sides. In the result I am satisfied that Thandavaraya would

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not have appointed Nataraja his opponent, as his successor, were it not for his desire to secure himself from further opposition. In my opinion he did not appoint him in the true interests of the Mutt. He consented to an arrangement of an unusual character under which he parted with a considerable portion of his temporal rights with an eye solely to his own security, and under pressure of great danger to himself.

It remains to apply the law to this finding on facts. First as to the question of the compromise: admittedly it *was* one and admittedly the defendant's right to the Pandarasannadhiship owes it's birth to that compromise. But is that fact alone sufficient to make the appointment bad? Mr. Krishnaswami Aiyar relies strongly on a decision in *Sundarambal Ammal* v. *Yogavanagurukkal* [1]. In that case, as appears from the judgment of Mr. Justice Sadasiva Aiyar, the Court was dealing with a suit in which the claim in dispute was to one-half share of the *puja miras* of a certain temple. The *puja miras* involved certain religious duties and the holder was entitled to some emoluments. A compromise was come to, which was found by the learned Judge to amount to an alienation of a portión of a religious office by one of the parties in favour of the other for a pecuniary benefit, and the learned judge refused to allow the compromise on the ground that it was not a lawful agreement on which a decree could be passed. The proposition he lays down is as follows :— "There can be no lawful compromise made of a dispute in respect of a religious office, the proper performance of the duties of which concerns not merely the parties to the compromise but principally affects the religious trust itself and the Hindu public for whose benefit the religious trust exists." The chief authority relied on for this proposition was the well-known case arising out of the dispute between the Rajah of Ramnad and certain Shanars, *Rajah M. Bhaskara Sethupathi and Irulappa Nadan* v. *Narayanasamy Gurukkal* [2]. I do not think that this latter case supports the wide proposition laid down by the learned judge. The view taken by the judge in that case was that the so-called compromise was a betrayal of rights successfully established in one Court by the person who vindicated them. In another case, *Kunhunni* alias *Ravi Varma Rajah* v. *Ramasubramania Pattar* [3], the same learned judge in dealing with a

1. (1914) I. L. R. 38 M. 850=26 M. L. J. 315. 2. (1901) 12 M. L. J. 360.
3. (1916) 31 M. L. J. 738,

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compromise with regard to property the subject of a religious trust and not with regard to the office itself, uses language somewhat analogous but I do not think that that case helps us much. Reliance is placed on a case in *Muhammad Ibrahim Khan* v. *Ahmad Said Khan* [1], but the point decided there was much narrower, *viz.* that a dispute as to the right of succession to a mutawalliship could not be settled by arbitration so as to oust the jurisdiction of the Court. The Advocate-General contends that the right to compromise matters of dispute arising in religious and charitable trusts does exist and he relies on a decision of the Privy Council in *Ramanathan Chetti* v. *Murugappa Chetti*, [2] but what was settled there was however merely an arrangement made by disputing parties for the due execution of the functions belonging to the office in turns or in some settled order and sequence. The case in *Giyana Sambandha Pandarasannadhi* v. *Kandasami Tambiran*, [3] is more in point, for there a dispute as to right to appoint between the heads of two different Mutts was compromised by an arrangement under which the persons holding office had their title recognised but the next Chinna-pattam was to be selected from the rival Mutt. Another case, *Nilakandan* v. *Pudmanabha* [4] is instructive because it went to the Privy Council. In that case disputes arose between certain parties as to the management of a temple in South Malabar which were temporarily set at rest by a compromise in 1845 and again in 1874, but the question was re-agitated 20 years later and it was urged that the compromise was not binding. It is to be noted that although it was attacked on the ground that it created a new right and thereby varied the original trusts of the institution, it was not argued before the Board that the compromise was unlawful as relating to a religious trust (*vide* *Nilakandhen Nambudiripad* v. *Padmanabha Ravi Varma* [5]). *Girijanund Datta Jha* v. *Sailajanund Datta Jha*,[6] is a decision directly in point, for in that case a suit was brought on a *ekrar* executed by the priest of an idol for arrears of maintenance and the defence was raised that the agreement was without lawful consideration as it amounted to a bargaining for the public office of high priest of a public shrine. The Court found that the *ekrar* was entered into in consequence of attempts made both by the

1. (1910) I. L. R. 32 A. 503.
2. (1906) I. L. R 29 M. 283.=16 M. L. J. 285.
3. (1887) I. L. R. 10 M. 375.
4. (1890) I. L. R. 14 M 153
5. (1894) I. L. R. 18 M. 1. (P. C.)
6. (1896) I. L. R. 23 Cal. 645.

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plaintiffs and the defendant to obtain the post of high priest on the death of the last holder of the office and that the dispute concerning this succession was settled by that compromise. The cases on the point were elaborately considered by the Court and the conclusion come to was that there was nothing contrary to public policy in the *fact* of the settlement of the dispute as to succession by a compromise. And lastly we have two recent decisions of this Court to both of which the learned Chief Justice was a party, in which this question was discussed. They are. *Arunachellam Chettiar* v. *Velappa Thambiran* [1], and *Thiruvambala Desikar Gnanasambanda Pandaram* v. *Chinna Pandaram alias Manikkavasaka Desikar* [2]. The result of both these cases may be summed in the language of the Chief Justce in *Arunachellam Chettiar* v. *Velappa Thambiran* [1] at page 419: "The better view appears to be that compromises of suits entered into by trustees of charitable endowments are not necessarily void." And this doctrine would seem to have been applied both in that suit in which no question of title between disputing claimants was involved, as well as in the latter case in *Thiruvambala Desika Gnanasambanda Pandaram* v. *Chinna Pandaram alias Manikkavasaka Desikar* [2] where the right of a *Mutathipathi* to remove the junior was in question and a compromise decree had been passed recognising the position of the junior. On a consideration of all the authorities, I have come to the conclusion that a trustee of a religious and charitable trust has, in respect of a litigation not affecting the office, the same right of compromise as an ordinary trustee has, and that a compromise even of conflicting claims to an office is not necessarily unlawful or opposed to public policy but must be scrutinized by the Court before which it is pleaded for the purpose of ascertaining whether it is in violation of the trust of the institution, or affects adversely the interests of the religious public. That disposes of the first objection taken by Mr. Krishnaswami Aiyar.

The next objection is one which arises on the view of the law which I have just stated. Mr. Krishnaswami Aiyar has urged the broad proposition that where any benefit is reserved by or accrues to a party entitled to make the appointment, the appointment is bad whether it be by compromise or by agreement. He has relied

1. (1915) 28 M. L. J. 410. 2. (1915) 30 M. L. J. 274.

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strongly on the analogy of the exercise of the power of appointment by a donee of a power and has quoted a large number of English cases. The Advocate-General, on the contrary, has invited our attention to a number of cases in which a reservation of rights was not held to vitiate the appointment. In my opinion a great deal turns on the question whether the circumstances relied on to impeach the appointment, constitute a motive for the appointment or whether the appointment was made with the intention of securing a benefit. But I do not think it necessary to examine the cases as in my opinion, although the principles applied in these cases may be of some assistance, they have not sufficient bearing to require detailed consideration. The Advocate-General has relied on the principles by which an adoption agreement made by a Hindu widow under which she acquires a distinct benefit is not illegal and asks us to apply that rule. I think the analogy still more remote and I will not deal with the cases. I would adopt the language of the Chief Justice in 28 M. L. J. 410 at page 418 in respect of this very question of compromise by a Pandarasannadhi. In that case the position of a Pandarasannadhi as regards alienations had been compared to that of a Hindu widow and the learned Chief Justice in delivering the judgment of the Court said as follows:—"We agree with the observation of Sadasiva Aiyar, J. in *Muthusami Iyer* v. *Sreemethanithi Swamiyar*, [1] that it is dangerous to press these analogies too far." In the case of an incumbent of a religious office whose rights and duties are mainly governed by usage and whose duties extend to a religious public that knows nothing of the arrangements under which he succeeds to the office, I would prefer to confine myself to the very simple test laid down by their Lordships of the Privy Council in *Ramalingham Pillai* v. *Vythilingham* [2]. This decision was on an appeal from our own Court and the question to be determined was whether the appellant was the lawful Dharmakarthi or trustee of the Rameswaram temple. On the 30th January 1894 the High Court removed one Ramanatha Pandaram from his office and on the same day he appointed the appellant as his successor purporting to make the appointment on a consideration of the fact that the appellant was a man of learning and of good character. The appointment was held to be bad, because Ramanatha Pandaram had already been removed and had therefore no power to

1. (1913) 25 M. L. J. 393. 2. (1893) I. L. R. 16 Mad. 490.

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appoint. But their Lordships further observed as follows :—"Another objection to the appointment of the appellant is that both Courts have found that it was not made *bonâ fide* * * *. The Judges of the High Court, referring to the proved facts, say ;—'With these facts before us, we cannot say that the Subordinate Judge was not warranted in finding that the appellant's appointment was made by the former Pandaram *in furtherance of his own interests* and that it was not a *bonâ fide* exercise of his power, if any. This finding of both Courts invalidates the whole appointment. It applies to the headship of the Mutt as well as the office of the Dharmakartha". In my opinion we have but to apply this language. The object in that case was certainly more grossly apparent than in this case, because the Pandaram had arranged for a personal allowance to himself after his dismissal, but the principle laid down by the Board seems to me to be of general application. On the conclusion that I have arrived at on the facts, *viz.*, that the appointment was not made with the intention of benefiting the institution but really to protect his own position which was in serious danger, I am of opinion that it is one which could not be upheld if attacked in the proper manner and at the proper time.

It remains now to consider certain objections raised by the Advocate-General to our exercise of the power of removing the defendant. The first objection is one of limitation. He contends that the Pandarasannadhiship to which the defendant succeeded in March 1902 was only the taking up of an office which necessarily vested in possession and that the right to succeed to it became vested in 1894, more than six years before the suit. In my opinion this contention cannot succeed. It is admitted that according to the usage of the Mutt, a Chinna-pattam can be removed for misconduct and so his right of succession is not absolute. Further the position of Chinna-pattam is one of greatly inferior sanctity and importance and it might well be that the persons interested would consent to his holding that office, although they were not willing to allow him to become Pandarasannadhi. I am therefore of opinion on the application of Article 120 of the Indian Limitation Act that the right to sue to remove him from the office of Pandarasannadhi vested in persons entitled to sue on the occasion of his taking that office, although the right to sue to remove him from the office of Chinna-pattam vested at the time of the appointment to that office. In this view I do not think it necessary to consider

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whether the right arises only on the sanction by the Advocate-General.

The next objection raised on behalf of the defendant is that by efflux of time the irregularity of the appointment is cured, and a number of English cases were brought to our notice. In my opinion, this is not a case of irregularity of appointment. It might be that if the qualification of a person appointed fell little short of those required by the usage and the appointment was otherwise unobjectionable and was made in the interests of the institution, the Court would not interfere. But here we have an appointment not made in the interests of the institution and the case is entirely different from those in which the appointment of a minister of religion not belonging to the particular sect of the founder, was upheld after it had existed for a considerable time.

I will now deal with two objections raised by the Advocate-General on procedure which, he claims, stand in the way of our giving effect to the view we take of the agreement and appointment. The first is that there was no issue raised in either of these suits as to the validity of the appointment. That is in fact so. But the allegation of invalidity was distinctly made in both plaints (*vide* paragraph 13) and pleaded to in paragraph 19 and further the validity of the subsequent cancellation of the appointment was alleged in the plaint and denied in the written statement in paragraphs 13 and 20 respectively and an issue was framed on this. (Issue 16). When these suits came on for trial they were heard with another suit, Original Suit No. 19 of 1912, which had been filed some years later. This suit was by a person who claimed the office by virtue of appointment by the Tambirans. The pleadings in that suit are not before us but the issues are and one of them (No. 4) is "whether the appointment of the defendant made by the late Thandavaraya was made *mala fide* and to serve his own purpose and therefore invalid." The whole of the evidence relating to the three suits was recorded by consent of parties in Original Suit No. 17, that is, Appeal No. 317 (*vide* Judgment of Lower Court, page 52), and the Judge finds on the question of the validity of the appointment on issues 1 and 2 in the suits before us and on issues 3 to 5 in the other suit. I am satisfied that the matter was treated as in issue in the present suits and that the non-existence of a specific issue at the trial was not considered of any

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importance there being the issue in the other suit. At the worst it would only be necessary for us to frame the issue formally in these suits and that can, if necessary, be deemed to be done.

The next objection is more serious. It is contended that the Court has no power to remove the defendant in the present suits which are brought under S. 92 with the consent of the Advocate-General. The learned Chief Justice has dealt with the history of these suits and I entirely agree with him in holding that it is not open to us to reconsider a decision already given in Appeal No. 317 of 1913. That decision is part of the Judgment in this appeal and can only be questioned on appeal to the Privy Council. To the extent, therefore, of the relief claimed in Appeal No. 317 of 1913 to remove the defendant from the headship of the Mutt, the matter is already decided and the suit fails. I entirely agree however with the learned Chief Justice that as to the second relief in Appeal No. 317 of 1913 and the whole of the matter in issue in Appeal No. 318 of 1913, we are not prevented by the first decision or the above view from giving effect to our finding. It is our duty to remove the trustee whose appointment is bad and in my opinion the fact that the trusteeship vests ex-officio in the holder of an office which we cannot touch in this suit makes no difference whatsoever. The decrees will be as stated in the Judgment of the learned Chief Justice.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS. [FULL BENCH].

Present:—Sir John Wallis, *Chief Justice*, Mr. Justice Abdur Rahim, Mr. Justice Oldfield, Mr. Justice Srinivasa Aiyangar, and Mr. Justice Phillips.

The Rajah of Cochin, represented by the Dewan J. W. Bhore, Esquire, I. C. S. ... *Appellant* (Plaintiff)*

v.

Kizhayil Kothanath Kittunni Nair (karnavan), and others. ... *Respondents (Defendants).*

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Malabar Compensation for Tenants' Improvements Act (I of 1900) S. 19—Lease—Provision for payment of Kuttikanom to landlord, on trees cut by tenant—Enforceability.

* S. A. No. 217 of 1915. 12th December, 1916.

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A stipulation in a Malabar lease for payment to the landlord of *Kuttikanam* (stump fee) at the customary rate of eight annas for every tree cut down by the tenant, is not contrary to the provisions of S. 19 of the Malabar Compensation for Tenants' Improvements Act.

Vasudevan Nambudripad v. *Valia Chattu Achan* [1] Referred to.

Second Appeal against the decree of the Court of the Subordinate Judge of South Malabar at Palghat in Appeal Suit No. 276 of 1914, preferred against the decree of the Court of the District Munsif of Alatur in Original Suit No. 464 of 1912.

The facts of the case are set out in the Order of Reference.

C. V. Anantakrishna Aiyar, for the Appellant.

T. Eroman Unni, for the 1st and 2nd Respondents.

The Court (Coutts Trotter and Seshagiri Aiyar, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH:—

Coutts Trotter, J.

Coutts Trotter, J:—This is a suit brought by the acting Dewan of Cochin, and the properties in question in the suit belong in jenm to the Cochin State. They were let on a pattam chit to the 1st defendant. The material term of the pattam chit is as follows: "The teak, rose-wood, jack and such kinds of trees which now exist, and may in future be produced in the properties mentioned in the schedule are not to be cut down and removed without the permission of the State and without paying the Kuttikanam, but if they are so cut and removed, I am liable for paying up either the fine imposed by the State or the value of the trees." There is no doubt that the defendants cut several trees without the permission of the State. The Kuttikanam is a sort of due said to be commonly levied on Malabar tenants in respect of trees cut and the effect of the evidence is that the ordinary rate is eight annas a tree. The value of the trees probably varies from Rs. 15 to double that amount. The action is finally brought to recover the value of the trees cut down without permission. But Mr. Anantakrishna Aiyar is willing to take a decree, if he can get it, at the Kuttikanam rate and no more. The contention for the defendants is that the clause in the lease which I have set out is rendered invalid by the provisions of S. 19 of the Malabar Compensation for Tenant's Improvements Act. That section is in these terms, "Nothing in any contract made after the first day of January 1886 shall take away or limit the right

1. (1900) I. L. R. 24 M. 47.

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of a tenant to make improvements and to claim compensation for them in accordance with the provisions of this Act." It is quite clear that the cutting of trees may in accordance with the recognised principles of forestry of itself be an improvement. Moreover any fetter on the right of cutting trees planted by the tenant may be regarded as necessarily a fetter on his right to plant them. It is, I think, impossible to say that it is not a limitation of the tenant's right to make improvements to compel him to obtain the landlord's permission as a condition precedent to cutting the trees. Can it be said that it is no limitation to require him to make payment to the landlord in respect of improvements effected by him, which I have already pointed out cutting down trees may in many cases be? It seems to me impossible to hold that it is not a limitation of the rights of a tenant to make improvements. It is argued for the landlord that to impose a customary fee is not limiting the right to make improvements, but only attaching a condition to it. S. 20 of the Act which preserves certain customary rights expressly limits them to improvements other than those dealt with under the Act. So far from assisting the plaintiff the section seems to me by implication to abolish any customary rights relating to improvements which are dealt with by the Act, and in any event the plaintiff's claim must be under the express clause of this lease and not under any custom "*Expressum facit cessere tacitum*" Speaking for myself I see no answer to the argument that to make the tenant's right to carry out an improvement depend upon his making a payment to his landlord is of necessity to put a limitation upon that right.

As my brother Seshagiri Aiyar takes a different view and as his view has been shared by other Judges of this Court, I think it will be best to have the matter settled by referring it to a Full Bench. The question referred will be this:—

"Whether a provision in a Malabar lease that a tenant shall pay Kuttikanam or some fee to his landlord in respect of trees cut down is contrary to the provisions of section 19 of the Malabar Compensation for Tenants' Improvements Act."

Seshagiri Aiyar, J.

Seshagiri Aiyar, J:—The short question in this case is whether the provision in Exhibit E which the plaintiff, the Rajah of Cochin, wants to enforce against the defendants, his tenants, is obnoxious to section 19 of the Malabar Compensation for Tenants'

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Improvements Act. The provision is in these terms: "The teak, rose-wood, jack and such kinds of trees which now exist, and may in future be produced, in the properties mentioned in the schedule are not to be cut down and removed without the permission of the state and without paying the Kuttikanam fee, but if they are so cut and removed, I am liable for paying up either the fine imposed by the State or the value of the trees." The suit is brought for the value of the trees as the tenant cut and carried away certain trees without paying the Kuttikanam fee and without obtaining the previous sanction of the landlord. The document may be stated to contain the following conditions: (1) The tenants must before cutting the trees obtain the permission of the Sircar; (2) he should also pay the Kuttikanam fee in respect of the trees cut; and (3) if they are cut and removed without obtaining the permission and without paying the fee, the tenant must pay either the value of the trees or such damages as the landlord may fix. I am prepared to concede that the provision for obtaining the permission of the landlord before cutting the trees is not enforceable. Similar provisions in pattas granted by the landlords in the East Coast have been regarded as invalid. At the same time, I am not prepared to say that this provision for obtaining the permission of the landlord contravenes Section 19 of the Compensation for Tenants' Improvements Act. Even granting that this provision is opposed to section 19, the only effect of its inclusion would be to make this particular provision infructuous and not to render other conditions which may be perfectly legitimate invalid. As regards the next condition for the payment of Kuttikanam fee, I am unable to see objection to it. In Logan's Malabar Manual it is described as being in the nature of a seigniorage or a stump fee; and it is said by this writer who had considerable experience of Malabar that it was a customary fee paid by tenants to landlords for cutting trees whether planted by the landlord or the tenant. Such a condition does not in any way take away or limit the right of a tenant to make improvements. It only lays claim to a small payment which according to Mr. Logan is eight annas for each tree cut. This would leave the tenant full liberty to make whatever improvements he likes upon the property. As pointed out by the Full Bench in *Vasudevan Nambudripad* v. *Valia Chathu Achan*, [1], if

1. (1900) I. L. R. 24 Mad. 47 at 55,

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conditions are embodied in a document which are consistent with the customary law of the country, they should not be regarded as being in contravention of S. 19 of the Tenants' Improvements Act. In Civil Revision Petition No. 122 of 1905 Davies, J., held that a provision for the payment of Kuttikanam fee is not opposed to S. 19 of the Act. In second Appeal No. 1076 of 1905 the same view was taken by Benson and Munro, JJ. It is true that in neither of the cases the respondent was represented; but as the learned Judges who decided these cases had considerable experience of Malabar, I am inclined to attach importance to their pronouncements, especially as I am of opinion that this provision would not affect or limit the right of a tenant to make any improvements he pleases upon the property.

The next provision for the payment of any damages that may be fixed by the landlord or the value of the trees is undoubtedly penal in its character. Under section 74 of the Indian Contract Act the Court may refuse to enforce such a provision and may fix such damages as in its opinion may legitimately compensate the landlord for the injury done. But the introduction of such a clause is not a reason for holding that the provision about the Kuttikanam fee should be regarded as being opposed to law. It is well known that a contract may contain provisions, some of them legitimate and valid and others invalid and unenforceable. It does not follow that a valid provision should not be given effect to because it is coupled with an invalid provision. I am not satisfied that the provision for the payment of Kuttikanam fee is opposed to the statute, and that the landlord is not entitled to some reasonable compensation for the tenant having cut and carried away the trees without paying him that fee.

But as the question is one of importance, I agree that the question proposed by my learned brother be referred to a Full Bench.

This Second Appeal came on for hearing on Monday, the 27th day of November 1916.

C. V. Anantakrishna Aiyar, vakil for the appellant.

T. Eroman Unni, vakil for the 1st and 2nd respondents.

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The Court expressed the following

Opinions:—*The Chief Justice.*—In considering whether a kanomdar had a right to cut and carry away trees planted by himself the Full Bench in *Vasudevan Nambudripad* v. *Valia Chathu Achan* [1], held that, whether the case was treated as governed by the Transfer of Property Act or not, the kanomdar had such a right in the absence of a contract or custom to the contrary, and that Madras Act I of 1900 did not deprive him of it by requiring him to keep the trees upon the holding and have compensation assessed upon them. The case contains no reference to S. 19, and there was no occasion for the learned Judges to consider whether a contract not to cut and remove trees without the landlord's permission and to pay a fee when such permission was granted was invalid under that section as taking away or limiting the tenants' right to make improvements. That section was no doubt intended to secure the tenant's right to make improvements as well as to claim compensation for them, and strikes at all attempts by contract to limit these rights either directly or indirectly. At the same time it must be construed strictly, and not extended to cases which cannot have been in the contemplation of the legislature. Before the passing of the Act it was open to a landlord when letting land suitable for planting trees and in consideration of the use and enjoyment of his land by the tenant to stipulate either for payment of an annual rent or in some other way or for a payment of an annual rent plus a Kuttikanam or stump fee according to a very general practice on the West Coast. I do not think that the section was intended to affect stipulations for the payment of a moderate fee such as the Kuttikanam claimed in the present case, or that such a stipulation can be regarded as limiting the tenants' right of making improvements by planting trees, or by cutting them down to make a clearance. If the trees planted by the tenant are left on the land at the determination of the tenancy the tenant is only entitled under section 10 to three-fourths of their value. The suggestion in *Vasudevan Nambudripad* v. *Valia Chathu Achan*, [1] that this allowance was made to the landlord on the ground that his purchase of the trees is compulsory fails to take account of the fact that no such allowance is made under

1. (1900) I. L. R. 24 M, 47.

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section 9 as regards improvements generally. When the subject was before the Legislature in 1887 and 1899, the case in *Vasudevan Nambudripad* v. *Valia Chathu Achan*, [1] had not been decided and the respective rights of the landlord and tenant in trees planted by the tenant were still matters of controversy. In these circumstances there is considerable force in the contention urged upon us that one-fourth of their value was allowed to the landlord in recognition of the fact that the trees had been raised on his land.

If the stipulation is not open to objection as limiting the tenant's right to plant trees, still less can it be so as limiting his right to cut trees by way of clearance. In such a case the tenant when cutting and carrying away the trees, gets far more after paying the Kuttikanam than he would be entitled to as compensation on the determination of the tenancy which would only be three-fourths of their value in the case of trees planted by himself and those through whom he claims and only the cost of support and maintenance in the case of other trees. Further it must be borne in mind that it must be a question of fact in each case whether such felling is an improvement within the meaning of the Act.

Confining myself to the case before us, I would answer that a stipulation in a Malabar lease for the payment of Kuttikanam to the landlord in respect of trees cut down is not contrary to the provisions of section 19 of the Act. Other cases may be dealt with when they arise. In the meantime it may be sufficient to say that the Courts will not countenance attempts on the part of landlords to appropriate to themselves by means of contracts the interests in improvements which the Act was intended to secure to the tenants.

Abdur Rahim, J.

Abdur Rahim, J.:—I agree in the answer proposed by the learned Chief Justice. The cutting of trees as suggested by Coutts Trotter, J., in the Order of Reference may of itself be an improvement but whether it is so or not must depend on the facts of each case, taking into consideration the nature of the holding, the kind and the number of the trees that are cut and the use that is sought to be made of the land. But this is not to be assumed as a general proposition as the question referred to us seems to do, and it may be mentioned that it was stated to us

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at the bar that no such case was sought to be made by any of the parties concerned in the present litigation.

Supposing a case when the cutting of trees would be an act in the nature of improvement within the meaning of the Malabar Compensation for Tenants' Improvements Act it does not follow that a contract for the payment of "some fee" to the landlord must necessarily limit the right of the tenant to make improvement and claim compensation. If the trees were on the land at the time of the commencement of the tenancy and therefore belonged to the landlord (*Vasudevan Nambudripad* v. *Valia Chattu Achan* [1]) there is nothing in the Act which would justify us in holding that the tenant is entitled to appropriate their value, if it was found necessary to cut them in the course of making improvements. Even if the trees grew or were planted by the tenant after the grant of the lease there is nothing in the Act debarring the landlord from contracting for payment of a certain sum for each tree which the tenant may cut for the purpose of making improvements, provided the payment demanded is not so unreasonable as to be prohibitive of the cutting of trees at all. Here the Kuttikanam stipulated for is the customary fee of eight annas per tree while the value of each tree is about Rs. 15 and it cannot be said that such a demand is likely to deter any reasonable tenant from improving the holding if he be so inclined.

The Act however far it goes in order to encourage the tenants in making improvements on lands in Malabar cannot be presumed to affect in any way the proprietary rights of jenmis or to interfere with contracts for payment of rents or other dues for the use and occupation of their lands. Its object is to assure to the tenants the right to make improvements and to obtain at the time he leaves the land the full value of the improvements which he may have made. If the arguments put forward on behalf of the tenant were sound it would logically follow, if pushed to their full lengths that even an ordinary contract for the payment of rent is necessarily a limitation of the tenants' right to make improvements. Such a payment as that referred in the question leaves the tenant as pointed out by Seshagiri Aiyar, J. full liberty to make whatever improvements he likes upon the property and is not therefore contrary to the provisions of section 19 of the Act.

1. (1900) I. L. R. 24 Mad. 47 p. 54.

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Phillips, J.

Oldfield, J.:—I concur in the answer to the reference proposed by the learned Chief Justice for the reasons given by him and Abdur Rahim, J.

Srinivasa Aiyangar, J.:—I agree with the learned Chief Justice.

Phillips, J.:—This reference has been made on two grounds, one that the cutting down of trees may in itself be an improvement within the meaning of the Act, and the other that a charge levied on the cutting down of trees may be deemed to be a limitation of the right to plant those trees. In the present case it is conceded that the cutting down of the trees is not in itself an improvement, and judging from my experience of Malabar I should think that it can only be in very exceptional cases that the cutting down of valuable trees such as teak, rosewood and jack, with which alone we are concerned in the present case, would be an improvement. Such cases must necessarily be so rare that it seems unnecessary to deal with the question beyond saying that if such cutting is found to be an improvement it is quite possible that the limitation of such cutting might be a limitation of the right to make improvements, and such exceptional cases must be dealt with on their merits. The second proposition that a charge levied on the cutting down of valuable trees may be a limitation of the right to make improvements seems to me to be based on a confusion between the right to make improvements and the right to enjoy them when made. If a tenant plants a tree he is not bound to cut it down before the end of the tenancy. If it is in existence at the end of the tenancy, he is entitled to compensation, but not otherwise, and if he chooses to enjoy the benefit of the tree by cutting it down during the tenancy, no question of compensation arises, and consequently it is difficult to see how an agreement to pay some fee for each tree cut can limit the right of a tenant to make improvements and to claim compensation for them within the meaning of S. 19 of the Act. If the tenant cuts down a tree he gets the full value of it less the fee imposed, but as he need not cut down the tree the fee imposed can in no way prevent him from growing it except possibly when the fee is unreasonably large, a case which we need not consider now.

I therefore agree with the answer given by the learned Chief Justice.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

Present:—Mr. Justice Abdur Rahim, Mr. Justice Spencer, and Mr. Justice Srinivasa Aiyangar.

P. L. S. Palaniappa Chetty *alias* Shanmugam Chetty .. *Appellant* * (*1st Defendant*).

v.

P. L. P. P. L. Palaniappa Chetty and others. ... *Respondents* (*Plaintiffs and Defendants 2 to 12*).

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Palaniappa Chetty *v.* Palaniappa Chetty.

Civil Procedure Code (Act V of 1908) O. 40, R. 1 and O. 43, R. 1 (S)—Order for appointment of receiver, before a particular person is selected and appointed as such, if appealable.

Held by the Full Bench (Spencer, J. dissenting):—

An order determining that it is just and convenient to appoint a receiver (*i e.*) an order for the appointment of a receiver and before a particular person is selected and appointed as such receiver, is one under O. 40, R. 1 and is therefore appealable under O. 43 R. 1 (S) of the Code of Civil Procedure.

Venkatasami v. *Stridevamma* [1] *applied. Upendra Nath Nag Chowdry* v. *Bhupendra Nath Nag Chowdry* [2]. *Srinivasa Prasad* v. *Kesho Prasad* [3] dissented from.

Per Spencer J: An appeal is premature if preferred before a receiver has been appointed by name, for the reason that until that is done the order is merely interlocutory and does not completely dispose of the petition to appoint a receiver.

Appeal against the order of the Court of the Temporary Subordinate Judge of Sivaganga dated the 25th February 1916 in Interlocutory Application No. 429 of 1915 in Ordinary Suit No. 46 of 1915.

On 25-2-1916 the Subordinate Judge of Sivaganga delivered the following judgment on an application for the appointment of a receiver;—"......................For the above reasons, I have come to the conclusion that in this case a receiver should be appointed with regard to the properties described in Schedules A, B and B (1), to take charge of them and manage the same according to the directions of the Court. The petition shall stand adjourned to 3rd March to consider the questions as to (1) who is to be appointed receiver and (2) what directions ought to be given to him." An order in terms of the judgment was issued on the same date. The first defendant preferred an appeal to the High Court against this order. No receiver had been appointed up to the date of the presentation of the appeal to the High Court.

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* A. A. O. No. 73 of 1916. 15th November, 1916.

1. (1887) I. L. R. 10 Mad. 179. 2. (1910) 13 C. L. J. 157.

3. (1911) 14 C. L. J. 489.

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The Court (Seshagiri Aiyar and Phillips, JJ.) made the following.

ORDER OF REFERENCE TO A FULL BENCH:—

In this case the Subordinate Judge passed, what he calls, a judgment on the 25th February 1916 in which he expresses the opinion that a Receiver should be appointed, and which he concludes by saying " The petition shall stand adjourned......" The same day an order in the terms of the judgment was issued. Against this order an appeal has been preferred to this Court. It is admitted that up to the date of the presentation of the appeal no Receiver was appointed. Mr. T. R. Ramachandrier has taken the preliminary objection that no appeal lies, as under Rule 1, Clause (1) (*a*) of Order 40, Civil Procedure Code, 1908, the order is not complete until a proper person is appointed Receiver. He is supported in this contention by *Narbadashankar* v. *Kevaldas* [1] and *Upendra Nath Nag Chowdhry* v. *Bhupendra Nath Nag Chowdhry* [2] on the other hand, this view will be to a certain extent inconsistent with the Full Bench Decision of this Court in *Venkatasami* v. *Stridavamma* [3] which holds that against the order refusing to appoint a Receiver there is an appeal. If an order refusing is covered by Rule 1, Clause (1) (*a*) of Order 40 which corresponds to S. 503 (*a*) of the old code, it is difficult to contend that the order which makes a pronouncement that a Receiver should be appointed is not within the rule. The decision in *Venkatasami* v. *Stridavamma* [3] was accepted as good law in *Sangappa* v. *Shivbasawa* [4] and in *Cursetji* v. *Gangaram* [5] and was not dissented from by the other High Courts.

The practice of this Court to which the learned Advocate General drew our attention is in accordance with the view that an appeal lies against the conclusion to appoint a Receiver, though no specific person is appointed.

There is another view which we are inclined to adopt. The pronouncement of the court that a Receiver should be appointed should be regarded as an interlocutory statement, and until a person is appointed, there is no final order under Rule 1 of Order 40. If we are right in this opinion, the Subordinate Judge had no jurisdiction to issue an order on his conclusion that a receiver should be appointed. Our inclination is, if this position is correct,

1. (1915) 17 Bom. L. R. 510.
2. (1910) 13 C. L. J. 157.
3. (1887) I. L. R. 10 M. 179.
4. (1900) I. L. R. 24 B. 38.
5. (1915) 17 Bom. L. R. 680.

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to set aside the order as having been passed without jurisdiction and to direct the Lower Court to pass fresh orders on the petition.

However, as the questions are not free from doubt and as there are pronouncements of the other Courts which are seemingly inconsistent with the view of the Full Bench in this Court, we submit for the Opinion of the Full Bench the following questions:—

(*a*) Whether the pronouncement of the Subordinate Judge that a Receiver should be appointed is a final order as contemplated by Order 40 Rule 1, Civil Procedure Code;

(*b*) and, if so, whether such an order is appealable?

The *Hon'ble the Acting Advocate-General* (*S. Srinivasa Aiyangar*) for the appellant:—The relevant provisions of the C.P. Code are S. 104 (i), O. 43 R. 1 (s) and O. 40, R. I. There is a right of appeal against an order under O. 40 R. I. An order *for* the appointment of a receiver comes within O. 40 R. I (a). A literal construction O. 40 R. 1 and O. 43 R. 1 (s) would involve that an order refusing to appoint a receiver is not appealable. See however *Venkatasami* v. *Stridevamma* [1] where an order refusing to appoint a Receiver is held appealable. *Pari ratione* an order determining that there should be a receiver is appealable. The language of O. 40 R. 1 is "appoint a receiver" and not "appoint a particular person as receiver." In the majority of cases the objection of the parties will only be to the order determining that there should be a receiver or to the receiving order and not to the person actually appointed as receiver.

[*Spencer, J*:—Is there an appeal against an order nominating a person as receiver?]

There is under the wide language of O. 40 R. 1. Supposing the parties differ as to the propriety of appointing a receiver, but agree as to the person to be appointed in case such an appointment is deemed essential, there is no appeal in such a case if it is held generally that an order determining that a receiver should be appointed is not appealable. An order under O. 40 R. 1 need not be in terms of O. 40 R. 1 (a) C.P.C. It may be an order of refusal. Unless it is held that an order under O. 40 R. 1 (a) cannot be made without naming a person as receiver the order in question comes within the Sub-Rule. The reasoning in *Venkatasami* v. *Stridavamma* [1] is in my favour.

1, (1887) I. L. R. 10 M. 179.

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[*Spencer, J.*—That was under S. 505 of the old Code which is not found in the new Code.]

That is immaterial as the question here is whether the present order comes within O. 40 R. 1. *Sangappa* v. *Shivalasawa* [1]. *Upendra Nath* v. *Bhupendra Nath* [2] is wrongly decided. *Narbadashanker* v. *Kevaldas* [3] which is against me is based on a misconstruction of S. 94 of the C. P. Code. S. 94 deals only with interlocutory orders which are prescribed by rules and not sections of the code as a receiving order is. *Srinivas Prosad* v. *Kesho Prosad* [4], is an extreme case. In effect it says that the order of appointment must date from the date of the person appointed giving the required security. All the trouble of giving security, testing and accepting it will be a waste if it turns out that the order for appointment is to be eventually discharged as unnecessary or unjust. In Allahabad, an order of this kind is regarded as a provisional order amounting to a mere expression of opinion. *Ramji* v. *Koman Das* [5]. The order is binding on the parties and on the Court and not in any sense provisional. The practice of this High Court has been to entertain appeals of this kind. C. M. A. No. 188 of 1910; C. M. A. No. 191 of 1913.

[*Spencer, J.*:—The order in this case is that the petition be adjourned for some body being appointed. There has been no final disposal of the petition.]

The final order appointing a particular person is called a warrant. That is his authority for acting. It is merely carrying out the order. See Form No. 9 in App. F., Civil Procedure Code.

[*Abdur Rahim, J.*:—What is the period of limitation for appeal ?]

Art. 156 of the Limitation Act provides 90 days from the date of the decree or order. What is to be the date of the order, in case a named person is appointed receiver conditionally on his giving security ? The English practice supports me.

An order for the appointment of a receiver is passed in Court in England. It is the receiving order. The final order appointing some person as receiver is made in Chambers. The final order is only ministerial and is drawn up by the registrar in England. In re *Llewellyn, Lane* v. *Lane* [6], Daniell's Chancery

1. (1900) I. L. R. 24 B. 33.
2. (1910) 13 C. L. J. 157.
3. (1915) 17 Bom. L. R. 510.
4. (1911) 14 C. L. J. 489, 499.
5. (1914) 13 A. L. J. 79.
6. (1884) 25 Ch. D. 66.

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Practice, 7th Edition, p. 1434; Seton on Decrees, 6th Edition, p. 749.

[*Srinivasa Aiyangar, J.* :—*Northard* v. *Proctor* [1] seems to be in point.]

In that case an appeal against an order for appointment of a receiver was allowed. Kerr on Receivers, p. 163. *Perry* v. *Oriental Hotels Co.* [2].

N. S. Rangaswami Iyengar for *T. Narasimha Iyengar* for Respondent.—As regards positive authority, the decision of all the High Courts is against the appellant's contention. Another case not cited by the other side is *Mathura Debi* v. *Shib Dyal* [3].

The contention on the other side will, if accepted, lead to multiplicity of appeals. The cases cited in the order of reference and by the other side negative an appeal in this case. There is only a provisional order.

[*Srinivasa Aiyangar, J.*—Can the court change its mind ?]

Even in the case of other interlocutory orders it cannot. Cf. orders under O. 40 R. 3 C. P. Code and a preliminary order under S. 92, C. P. Code. The English practice is of no use in the face of the express provisions of the C. P. Code.

The Hon'ble the Ag. Advocate-General in reply :

The term 'order' is defined in S. 2 (14) C. P. C. Order 43 R. 1 (s) does not distinguish between interlocutory and final orders. The receiver is not a party to the appeal and it is therefore unnecessary that he should be named. This is a dispute between the parties in which the Receiver is not interested. The balance of convenience is in favour of entertaining an appeal at this stage.

The Court expressed the following

Srinivasa Aiyangar, J.

Opinions :—*Srinivasa Aiyangar, J* :—The substantial question referred to us for determination is whether an order determining that it is just and convenient to appoint a receiver, *i. e.*, an order for the appointment of a receiver, and before a particular person is selected and appointed as such receiver, is appealable.

The right of appeal is conferred by clause S of Order XLIII which provides *inter alia* that an appeal shall lie from an order under Rule 1 of Order XL; and that rule, omitting the portions not material for the present purpose, is in these terms " where it

1. (1875) L. R. 1 Ch. D. 4. 2. (1904) 1 Ch. 662.
3. (1909) 3 I. C. 430.

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appears to the Court to be just and convenient the Court *may* by order (a) appoint a receiver." The question is whether the order referred to above is an order under this rule.

When an application is made for the appointment of a receiver, the most important question for determination is, whether it is just and convenient to appoint a receiver in the circumstances, and if the Court comes to the conclusion, that it is not shewn to be just and convenient to appoint a receiver, it must dismiss the application. This determination is made under rule 1, and there can be no doubt that that order is appealable. It was so decided in *Venkatasami* v. *Stridevamma* [1] on the construction of the corresponding provision of the old code and as pointed out in *Cursetji* v. *Gangaram* [2], the same construction must be placed on the similar provision in the New Code. The same view has been adopted in Allahabad in the recent case of *Muni Lal* v. *Jagan Nath* [3]. But these decisions do not throw much light on the present question for it can easily be contended that orders declining to appoint a receiver and orders appointing a receiver are exhaustive of the category of orders contemplated by rule 1, as the discretionary power to appoint a receiver, conferred by that rule, includes the power to reject an application for such appointment and nothing more. This was apparently the view taken by the learned judges of the Bombay High Court in *Cursetji* v. *Gangaram* [2]. The above rulings however emphasize the fact that the right of the appeal is not restricted to any particular kind of order under rule 1 and an appeal lies against *all* orders under that rule.

That an order determining, that it is just and convenient to appoint a receiver, is an *order*, can I think scarcely admit of doubt; and the practice of the English Courts by which first an order is made for the appointment of a receiver in Court leaving the selection of the person to be appointed to be settled in chambers, is conclusive of the question. The determination is I think more than 'a mere interlocutory statement' if that phrase means, an expression of opinion, for there can be no doubt that the Court which determined that it was necessary to appoint a receiver cannot change it of its own accord without a review or other proper proceeding. I also think that

1. (1887) I. L. R. 10 Mad. 179.
2. (1915) 17 Bom. L. R. page 680.
3. (1916) 33 I. C. 735.

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the Subordinate Judge in this case on his determination that a receiver should be appointed was entitled to issue an order. In *Nothard* v. *Proctor*, [1] the order appealed against appears to be an order for the appointment of a receiver and not an order appointing a particular person as receiver and no question was raised that it was not a judgment or order. If it is an order, the order is certainly one under Order 40, Rule 1 as the Court determines the question of the necessity for the appointment of a receiver under this order. Reference was made to S. 94 of the Code as conferring the power to appoint a receiver, but it is to be observed that that power can be exercised only if rules provide for such exercise and in accordance with those rules.

Even if I am wrong in this, and if the orders under Order 40, Rule 1, can only be of 2 classes, one rejecting applications for receivers, and the other, orders appointing receivers, I agree with the contention of the learned Advocate General that an order for the appointment of a receiver is as much an order 'appointing a receiver,' as an order naming a particular person as receiver. In England an appeal is allowed without leave from an order appointing a receiver and I can find no restriction of the right, in the decided cases, to cases where a receiver is named in the order of the Court, or to orders passed in chambers appointing a particular person. In a majority of cases, the appeal will be directed against the determination that it is necessary to appoint a receiver rather than against the particular person appointed, as the person to be appointed is very often a matter of agreement between the parties. This construction may no doubt lead to a multiplicity of appeals as was pointed out in *Narbadashankar* v. *Kevaldas*, [2] but I do not see how that can be avoided in any view; for instance one man may be appointed receiver, and after appeal filed, he may resign and another appointed. In fact the learned pleader who argued that the order was not appealable said that if after an appeal, the person appointed as receiver resigned or ceased to be receiver, the appeal abated, though the grounds of appeal may have been solely directed to challenging the necessity for the appointment of any receiver. On the other hand I do not see any purpose in compelling a party to wait till the receiver is appointed and if as held in

1. (1875) L. R. 1 Ch. D. p. 4. 2. (1915) 17 Bom. L. R. 510.

Srinivas Prosad Singh v. Kesho Prosad Singh [1]. that the appointment is not complete till the receiver has completed the security, till such completion. If the order of appointment is discharged by the Appellate Court all the expense incurred in giving security will be thrown away. In *Perry* v. *Oriental Hotels Company* [2], where there was first an order by the Vice Chancellor ordering the appointment of a receiver and an order in chambers appointing a particular person, L. J. Gifford in appeal, though he discharged the order appointing the particular person directed the successful appellant to pay the costs of the recognizances, remarking that the appellant should have come to the court of appeal before the recognizances were entered into.

There may again be a difficulty in ascertaining the date of appointment of a receiver and the date may become important for calculating the period of limitation, for appeal. The order appointing a named person as receiver may appoint him receiver and direct him to give security within a limited time, or may make the appointment conditional on giving security (Seton Form No. 5, page 727, No. 1, p. 657). In the former case if the person appointed does not give the security he my cease to be receiver and any appeal presented in the meantime would become useless. In the latter case on security being completed no further order may be passed, except the issuing of a warrant of appointment. The English practice appears to be, not to pass or enter the order till the security is completed *Ridout* v. *Fowler* [3] but under the procedure code in the mofussil there is no such practice. In such a case what is the date of the order appointing a receiver ? In some cases and for some purposes on the completion of the security, the appointment relates back to the date when it was made. Kerr on Receivers p. 163.

From the forms printed in Seton, it will be seen that an 'order appointing a receiver' includes an order directing that a proper person be appointed receiver, as well as an order appointing a named person (cf. Form Nos. 13 and 19 with Nos. 16, 20, 21, Section 1, Ch. XXXII). It is not therefore improper to speak of an order 'for the appointment of a receiver' as an order 'appointing a receiver' within the meaning of Order, 40 rule 1.

1. (1911) 14 C. L. J. 489. at 499. 2. (1870) L R. 5 App. Ch. 420.
3 (1904) 1 Ch. 662.

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It has been the practice of this court to allow appeals from these orders and I. see no sufficient reason to hold that on the construction of the relevant rules and orders this practice is illegal.

A different view has been taken in Calcutta first by Chitty and Richardson, JJ. in *Mathuria Debi* v. *Shib Dyal*, [1] where the learned Judges purported to follow the decision in *Birajan Koer* v. *Ramchurn Lall Mahta* [2] which was an appeal against an order or expression of opinion by a Subordinate Judge submitting the name of a person to be appointed as receiver under S. 505 of the Old Code. The order appointing a receiver had to be made under S. 503 and under S. 588 an appeal was allowed only against orders under S. 503.

S. 505 of the Old Code is now repealed and with all respect, the order appealed against in *Birajan* v. *Ram Churn*, [2] has nothing in common with the order in the present case. In *Upendra Nath* v. *Bupendra Nath*, [3] Mookerjee and Teunon, JJ. held that an order not appointing a named person as receiver is not appealable and the leraned Judges came to that conclusion on the ground that an appeal lies only from a final order appointing a receiver; and in the later case of *Srinivas Prosad* v. *Kesho Prosad* [4] Mookerjee, J. delivering the judgment of the Court explained that there is no final or appealable order in cases where security is required from the receiver, before the completion of the security. With all respect I am unable to accept this interpretation of the rule, for the reasons which I have already given. In Bombay the view of the Calcutta High Court has been adopted, *Narbadashanker* v. *Kevaldas* [5]. Though the learned Judges came to the conclusion that an order for the appointment of a receiver is a *order* and also an order under Order XL, R. 1, yet for the purpose of appeal, only an order appointing a particular person is an order under Rule 1. As an order rejecting an application for receiver would also be appealable as an order under Rule 1, the Bombay High Court as I have already said apparently holds that only 2 kinds af orders fall within the category of orders under

1. (1909) 3 I. C 430
2. (1881) I. L. R. 7 Cal. 719.
3. (1913) 13 C. L. J. 157.
4. (1911) 14 C. L. J, 489 at 499.
5. (1915) 17 Bom. L. R. p. 510.

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order XL, Rule 1. I am not sure this is right and in any event I am not able to adopt the construction placed on the words 'order appointing a receiver.'

In *Ramji* v. *Koman Das* [1], Chamier and Piggott, JJ. appear to take the same view, though as pointed out in the judgment, the order under appeal there was peculiarly worded.

In the face of such weighty authority against my construction of the section, I venture to express my opinion with great diffidence; but having come to a clear conclusion in the matter, and seeing that the question involved is really a question of practice which can be changed if necessary by the High Courts by rules, I would answer the questions referred to us as follows:—

(*a*) The pronouncement of the Subordinate Judge that a Receiver should be appointed is an order under Order 40, Rule 1 and

(*b*) is appealable under Order 43, Cl. S.

Abdur Rahim, J.

Abdur Rahim, J:—I agree in the conclusion arrived at by Srinivasa Aiyangar, J.

Spencer, J.

Spencer, J:—I am of opinion that an appeal is premature if preferred before a receiver has been appointed by name, for the reason that until that is done the order is merely interlocutory and does not completely dispose of the petition to appoint. At first sight it would appear impossible to contend that when a Court decides that a Receiver should be appointed but does not appoint, the order of the Court is one appointing a Receiver. It is however argued that if an order refusing to appoint which is passed without naming a person is appealable, an order directing a Receiver to be appointed without naming any one for the appointment must also be appealable. I cannot see that this is a logical consequence. The difficulty seems to have arisen out of the rulings which have decided that a refusal to appoint is appealable as an Order made under Order XL R. (1) (a). This declares "where it appears to the Court to be just and convenient the Court may by order appoint a Receiver of any property whether before or after decree." When a Court altogether refuses to appoint a Receiver, there is no question of the person to be selected as Receiver, and the proceedings have reached a further stage of finality than they have when a pronouncement is made that a Receiver must be appointed

1. (1914) 13 A. L. J. p. 79.

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without appointing any one. A refusal to appoint necessarily disposes of the application to appoint but the other order does not do so. This may be seen from the instance out of which this reference has arisen. The Subordinate Judge after recording his opinion that a Receiver should be appointed adjourned the petition for a week to consider the questions (1) who should be appointed Receiver and (2) what instructions ought to be given him. It is easily conceivable that in certain circumstances there might be no objection to the appointment of a Receiver and yet there might be strong objections to the particular person selected for the office as when one of the parties to the suit is made a Receiver. In other cases the opposing party may be indifferent to the personality of the nominee and may take his stand entirely on the question whether the occasion is a fit one for taking the control of the property out of the hands of the person in possession. I doubt whether it can have been the intention of the Legislature to allow two appeals, one from the first decision as to the need of a receiver and another from the final order appointing a definite person by name to the office. It seems to me that such a procedure would involve a multiplicity of proceedings, a result which it is always desirable to avoid where possible. No one who wishes to appeal can complain of having to wait till a Receiver is actually selected, as the interval between the decision to appoint and the selection of an individual is unlikely to be long and in practice the Courts should generally be able to make them both simultaneous. If there is an interval, nobody's interests are prejudiced by waiting, as possession of property cannot be transferred until it is known who is to take it over.

An order that a Receiver should be appointed is in fact not an order that can be put into operation until someone is actually appointed.

I should therefore hesitate before attributing to the Legislature an intention to provide rights of appeal against incomplete and ineffective orders, even if the literal wording of the Code were not also against such a construction

I am not much impressed by the next argument which is based on the tentative character that an order of appointment bears until security is actually furnished by the person appointed.

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Whatever may be the practice in English Courts, the practice in India is to appoint a Receiver subject to his giving security to the satisfaction of the Court. Not only is there nothing forbidding this practice but the form of the warrant prescribed in Appendix F, Form 6 of the Code of Civil Procedure shows the practice to be correct. This warrant cannot be issued until an individual has been selected as it is to be addressed by name to the person appointed in these words:—"you are hereby (subject to your giving security to the satisfaction of the Court) appointed Receiver" etc.

Of necessity the order of appointment must precede the giving of security, for till then it is not known who must give it and what is its extent. But an order is not the less a final order because it is conditional. Of course if a person appointed does not furnish security as directed, it may be necessary for the party applying for a Receivership order to put in a fresh petition nominating another person. The Court will not act in the matter without being moved. On the fresh application being admitted, the Court will consider it and pass orders, and this will naturally give rise to a fresh right of appeal. The costs incurred in giving security will usually be trifling in this country in the mofussil and at any rate they are incidental to the proceedings.

I am thus of opinion that the matter of furnishing security has no bearing on the questions before us, and with due respect I consider that the case of *Srinivas Singh Prosad* v. *Kesho Prosad Singh*[1] which decided that the order of appointment of a Receiver must date, from the date of the person appointed giving the required security is not good law under the present Code of Civil Procedure. If the date of appointing a Receiver by name subject to his giving security be taken as the date from which to calculate the time for preferring an appeal under Order XLIII Rule 1 (s), then there will be no difficulty in ascertaining the date, as my learned brother Srinivasa Aiyangar, J., apprehends, for such appointments are made in open Court by the Courts in India and are dated on their pronouncement.

I may also observe that the Code contains another indication that such matters are intended to be subsidiary to the main order, in that no appeal is provided against directions under Order

1. (1911) 14 C. L. J. 489.

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XL, Rules 2 and 3 relative to the remuneration to be paid to and the security to be furnished by a Receiver appointed under Rule 1 of the same order.

I will now proceed to consider the reported cases. On the point we have to decide, they are all one way. In this High Court alone there is hitherto no reported case directly on the point.

It has been decided in *Upendra Nath Nag Chowdry* v. *Bhupendra Nath Nag Chowdhry* [1] and in *Mathuria Debi* v. *Shib Dyal Singh Hazari* [2] that the making of a Receivership order without nominating the Receiver is an interlocutory order and not appealable.

In Bombay and Allahabad the same conclusion has been reached in *Narbada Shankar* v. *Kevaldas* [3] and *Ramji* v. *Koman Das* [4].

The cases in *Venkatasami* v. *Stridavamma* [5] which overruled *Subramanya Chetti* v. *Appasami* [6] and in *Sangappa* v. *Shibasawa* [7] and in *Cursetji* v. *Gangaram* [8] deal with a different question *viz.*, whether an order refusing to appoint a Receiver is appealable. The learned Judges considered the effect of a decision come to by a Subordinate Court under Section 505 of the Old Code which finds no place in the present Code. So far as they involve the principle that a mere determination to appoint a Receiver is not appealable, these cases support the view taken by me.

As regards the non-appealable nature of interlocutory orders *Srinivas Prasad Singh* v. *Kesho Prosad Singh* [9] is also to the same effect, but as already observed, it goes too far in treating conditional appointments as inoperative and therefore not final orders.

As the practice in England of first making an order in Court for the appointment of a receiver and afterwards settling in Chambers who is to be appointed differs from the practice of Indian Courts of appointing Receivers by name in open Court, we cannot get much assistance from English Cases or from English books of reference. In India in matters of procedure Courts are governed by the Code. The answer to the reference must therefore

1. (1910) 13 Cal. L. J. 157.
2. (1909) 3 I. C. 430.
3. (1915) 17 Bom. L. R. 510.
4. (1914) 13 All. L. J. 79.
5. (1887) I. L. R. 10 M. 179. (F. B)
6. (1888) I. L. R. 6 M. 355.
7. (1900) I. L. R. 24 B. p. 38.
8. (1915) 17 Bom. L. R. 680.
9. (1911) 14 C. L. J 489.

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simply depend on the interpretation to be placed on the language of the order in the Code of Civil Procedure.

Instances have been cited in which this Court has heard appeals in cases where no Receiver had at the time of appeal been appointed by name; but when no objection was raised to the maintainability of the appeal, these can be no guide as to what the law is on the subject.

I agree with the opinion expressed by the two learned Judges who made the reference and with the decisions of the Calcutta, Allahabad and Bombay High Courts, and I would answer both questions referred to us in the negative.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Spencer.

Athan Kutti and others ... *Appellants** (*Defendants 10, 11, 12 and 23*)

v.

Kuttanat Illoth Narayan Nambudri's wife Matairl Illoth Subhadra Suterjanan and others ... *Respondent* (*Plaintiffs and Defendants*).

Athan Kutti v. Subhadra.

Mortgage—Prior mortgage with possession—Later simple mortgage, both mortgages being executed between 1858 and 1882—Clause in later mortgage for mortgagee becoming absolute owner in event of non-payment of principal and interest thereon on date fixed—Validity—Effect—Possession of mortgagee if adverse to mortgagor after date fixed—Transfer of Property Act—S. 60—Effect—Suit to redeem earlier mortgage—Right to sue on later mortgage barred on date of—Mortgagee if can claim redemption of later mortgage. Limitation Act, S. 20.

Where in 1874 A executed a mortgage with possession to defendant's ancestress for 36 years and in 1875 executed a simple mortgage to defendants on the same lands for Rs. 400, the latter containing a provision that if the principal amount with interest thereon was not discharged by 18-8-76 the mortgagor had no objection to the mortgagee's holding the property in absolute ownership free from both the mortgages, *held*, in a suit for redemption of the earlier mortgage brought after the expiration of the period allowed by Art. 132 of the Limitation Act for a suit to enforce the later mortgage, that

(1) under the equitable principles applicable to mortgages executed subsequent to 1858 and prior to 1882 the clause in the later mortgage in restraint of the right of redemption was a mere clog on the equity of redemption and inoperative;

(2) defendants' uninterrupted possession for 12 years from 18-8-76 was not adverse to the mortgagor and had not the effect of extinguishing his right to redeem; and

(3) it was not open to the defendants to set up their right as mortgagees under the later mortgage.

* S. A. No. 1595 of 1914. 3rd October, 1916.

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Per Ayling, J:—In the case of mortgages executed between 1858 and the date of the passing of the Transfer of Property Act an agreement of parties to the mortgage cannot affect the character of the mortgagee's possession so as to convert it from that of a mortgagee into that of a person prescribing for a full title. *Usman Khan* v. *Dasama* [1], distinguished.

Semble, a payment within the meaning of S. 20 of the Limitation Act must be a conscious act.

Second appeal against the decree of the District Court of South Malabar in A. S. No. 305 of 1913 preferred against the decree of the Court of the Subordinate Judge of S. Malabar at Calicut in O. S. No. 4 of 1911.

C. V. Anantakrishna Aiyar for Appellants.

T. R. Ramachandra Aiyar and C. Madhavan Nair for the Respondents.

The Court delivered the following

Ayling, J.

Judgments :—*Ayling, J*:—The main question for determination in this appeal is whether the plaintiffs' right of redemption is affected by the provision in Exhibit III, or by defendant's subsequent possession of the mortgaged property after the date prescribed for discharge of that document.

The facts are simple. On 14-11-74 by Exhibit A 1st plaintiff's father effected a mortgage with possession (kanom) of the plaint properties to defendant's ancestress Kunhachumma for 36 years for Rs. 3000. On 12-8-75 he executed another document Ex. III, which is in effect a simple mortgage on the same lands for Rs. 400. It was therein provided that if the latter amount with interest thereon was not discharged by 13-8-76 the mortgagor had no objection to the mortgagee's holding and enjoying the property as jenmam. It is admitted that the latter phrase means in absolute ownership and that the object of the clause is to terminate plaintiffs' right of redemption of both mortgages, Exhibit A and Exhibit III.

Both documents were executed long before the enactment of the Transfer of Property Act, and following the decisions in *Thumbusami Moodaly* v. *Hussain Rowthen*, [2] *Ramaswami Sastrial* v. *Samiyappa Naicken* [3] and *Venkatasubbiah* v. *Venkayya* [4], it seems to me, we have no option but to hold that this clause in restraint of the right of redemption is *per se*, inoperative.

1. (1912) I. L. R. 37 M. 545=23 M. L. J. 360.
2. (1876) I. L. R. 1 M. 1. (P. C.)
3. (1882) I. L. R 4 M. 179,
4. (1892) I. L. R. 15 M. 230=1 M. L. J, 677,

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It is however argued that although this may be so, yet the effect of the agreement of parties in Exhibit III is to alter the character of the possession of defendants or their ancestor from 13-8-76 and to render it adverse to the title of the mortgagor. This being so, defendants must after 12 years uninterrupted possession (which is not denied), have acquired full title to the property and plaintiff's right to redeem must be regarded as extinguished.

If no agreement of parties to a mortgage can operate, *ipso facto* to clog or restrain the equity of redemption and that is the law which has been declared to be applicable in Madras from 1858 up to the passing of the Transfer of Property Act (vide decisions above quoted) I find it difficult to understand how, consistently with this view, agreement of parties to a mortgage can affect the character of the mortgagee's possession so as to convert it from that of a mortgagee, into that of a person prescribing for a full title.

The chief authority relied on by appellants is *Usman Khan* v. *Dasama* 1. In that case a relinquishment by the mortgagor in favour of the mortgagee was held invalid to extinguish the equity of redemption, but, being followed by a continuance in possession of the mortgagee for more than the statutory period, the mortgagor's right to redeem was held to be extinguished. The learned judges were of opinion that it was open to the parties to agree in what character the mortgagee should hold possession and that they had agreed by the relinquishment above referred to that his possession thereafter should be as absolute owner. What distinguishes that case from the present one is this: The relinquishment or agreement was not only after the expiry of the period of mortgage, but after the enactment of the Transfer of Property Act, S. 60 of the latter provides that the right of redemption may be extinguished by act of parties, and this at once removes the case from the purview of the rulings already cited. None of them are in fact referred to.

In my opinion the possession of defendants after 13-8-76 must be treated as still that of mortgagees and not adverse to the mortgagor.

The only other question is whether plaintiffs are bound to redeem Exhibit III or whether defendant's rights thereunder

1. (1912) I. L. R. 37 M. 545=23 M. L. J. 360.

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have become extinguished under article 132 of Schedule 1 of the Limitation Act.

Reliance is placed on S. 20 of the Act and it is argued that defendants having admittedly failed to pay plaintiffs the *porappad* due under Exhibit A, it should be presumed that they appropriated it towards the interest due under Exhibit III year by year and that each such appropriation gives a fresh starting point of limitation. This argument hardly deserves serious consideration. Exhibit III makes no provision for payment of interest annually, but only on a single date (13-8-76). Apart from this, the appropriation thereto is a pure fiction, which we are not justified in raising and which was in fact not raised in defendant's written statement. Respondent contends with some reason, that a payment under S. 20 must be a conscious act. It may be taken as certain that no such appropriation was ever contemplated by the parties and it cannot be treated as a fact for the purpose of saving limitation.

Lastly it is contended that it is open to defendants to set up their right as mortgagees in a suit for possession although their right to enforce payment under Exhibit III may be barred under article 132. No authority has been quoted which seems to support such a proposition in this case. Defendants' possession is under another mortgage, Exhibit A, which it is sought to redeem and not under Exhibit III. Their rights under the latter have clearly become time barred and plaintiffs cannot be compelled to redeem them.

The appeal must be dismissed with costs. Time for payment extended to 4 months from this date.

Spencer, J.

Spencer, J.—I agree. Exhibit III is dated 12th August 1875. There can be no doubt that under the equitable principles held in *Ramaswami Sastrial* v. *Samiyappa Naicken*, [1] *Venkatasubbiah* v. *Venkayya*, [2] and *Neelakandhan* v. *Ananta Krishna Aiyar*, [3] to be applicable to mortgages executed subsequent to 1858 and prior to 1882 the forfeiture clause must be treated as a mere clog on the equity of redemption and no bar to a suit for redemption. (Vide Shephard and Brown's Transfer of Property Act, pp. 239 to 243 where the history of the litigation that preceded the introduction of the Act is discussed). The effect of the

1. (1882) I.L.R. 4 M. 179. 2. (1892) I.L.R. 15 M. 230=1 M.L.J. 677.
3. (1907) I. L. R. 30 M. 61=16 M. L. J. 462.

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Act was to preserve the same equity of redemption unfettered, S. 60 providing that only an independent act of the parties or an order of court could operate to extinguish it. (See *Perayya* v. *Venkata* [1]).

The agreement in Exhibit III that the mortgagee should enjoy the properties as his jenm if payment was not made by August 13th, 1876 cannot be treated as affording a starting point for adverse possession to run against the mortgagor, because no act was done on that date to alter the character of the mortgagee's possession. The mortgagee still remained in possession under Exhibit A which ran for a term of 36 years from 1874. It has been found by the District Judge that Kunhachumma and her heirs and representatives did not begin to deal with the properties as their jenm ealier than 12 years before suit. *Usman Khan* v. *Dasanna* [2], cited for the appellants, was a case in which by a term in the original mortgage deed it was provided that on the happening of a certain event, the mortgagee was to hold possession as an absolute owner, and when that event happened the parties at once showed by their acts and admissions that they had mutually agreed to alter the character of the possession according to the terms in the deed. *Shankar Din* v. *Gokal Prosad* [3] was a case where parties to a mortgage entered into a separate arrangement or compromise limiting the right of redemption. So long as the possession of Kunhachumma is capable of being attributed to the right she acquired under Exhibit A to enjoy the land as Kanomdar, there is no reason to regard it as possession adverse to the jenmi merely by reason of the inoperative clause in Exhibit III. In this connection I would refer to the observations of Bashyam Iyengar, J. in *Seshamma Shettathi* v. *Chikayya Hegadi* [4] as to the incapacity of a tenant or usufructuary mortgagee by setting up a title adverse to that of his landlord or mortgagee to acquire a title inconsistent with that under which he was let into possession before the period prescribed for the determination of his tenancy or the redemption of his mortgage, as the case may be, expires.

As to the question whether plaintiffs were bound to redeem Ex. III, which is styled a bond and is I think rightly treated by the Lower Courts as a simple mortgage with a clog on the

1. (1888) I.L. R. 11 M 403. 2. (1912) I. L. R. 37 M. 545=23 M. L. J. 360.
3. (1912) I. L. R. 34 A 620.
4. (1902) I.L.R. 25 M 507 at 511, 512=12 M. L. J. 119.

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equity of redemption, the mortgagee might have sued upon it at any time up to August 8th, 1910, notwithstanding the decision of the Privy Council in *Vasudeva Mudaliar* v. *Srinivasa Pillay* [1], that suits upon simple mortgages are governed by article 132 of Schedule II of the Limitation Act, which allows 12 years from the date when the money becomes due. S. 31 (1) of the Act specially allowed 60 years from the date of the money becoming due or 2 years from the passing of the Limitation Act of 1908 for mortgagees to institute suits for sale or foreclosure whichever period expired first. The 2 years expired first, and on the 11th January 1911 when this suit was instituted the mortgagees had already lost their right to recover the loan.

But it is argued that the defendants being in possession are entitled to rely on Exhibit III in bar of plaintiffs' suit although a suit to enforce their rights under the document may be barred. It has been often expressed that a defendant may in equity set up a defence that a certain instrument is, by reason of its invalidity or other defect, ineffectual against him, although if he sued to have it avoided or declared a nullity, his suit would be barred by limitation (vide *Lakshmidas* v. *Roop Lal*, [2] *Ramaswami* v. *Muthusami Naik* [3], and *Srikishan Lal* v. *Mussamat Kashmiro* [4].

This is very far from establishing a proposition that a party has a substantive right to compel his opponents to discharge a barred debt before they can succeed in their suit. In *Parasurama Pattar* v. *Venkatachellam Pattar* [5], where it was held that a mortgagor and a mortgagee are under mutual obligations to make all payments provided in the mortgage deed so long as the relationship of mortgagor and mortgagee continues, it was expressly stated that this rule did not extend to payments which the parties were liable to make otherwise than under the contract of mortgage. The liability of the parties under Exhibit III is distinct from their liability under the mortgage sought to be redeemed in the suit. Although the defendants are no doubt entitled by way of equitable defence to set up the clause in Exhibit III that provides against redemption after a fixed time we have already held that this clause is inoperative to bar redemption.

1. (1907) I. L. R. 30 M 426.=17 M. L. J. 444.
2. (1907) I.L.R. 30 M. 169=17 M.L.J. 19.
3. (1909) I.L.R. 30 M 248.
4. (1916) 31 M. L. J. 362. (P.C.)
5. (1913) 25 M. L. J. 561.

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The plea that limitation has been saved by the appropriation of rents towards interest is one into which I consider we cannot now enter as it is not made a ground of second appeal, nor was it argued on the receipt of a finding in the Lower Appellate Court upon this question of Exhibit III being time barred. Besides, the defendant's written statement has not been printed, and we are not now in possession of the necessary materials for deciding this mixed question of law and fact.

The claim for *post diem* interest has not been raised in the memo. of second appeal and must be disallowed.

I am of opinion that this second appeal should be dismissed with costs.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

Valia Konikkal Edathil Cheria Pangi Achan ... *Appellant*,* (*2nd Defendant*).

v.

Valia Konikkal Edathil Unnalachan and others ... *Respondents*, (*Plaintiffs and Defendants 1 and* 3 *to* 7).

Cheria Pangi Achan v. Unnalachan.

Malabar Law—De jure Karnavan—Restriction of powers by family Karar—Breach of provisions of Karar—Suit for removal of Karnavan—Maintainability—Conditions—Karnavan undertaking to manage well in future—Effect—Conditional decree against de jure Karnavan—Validity on dissentient members—Family Karar—Validity—Consent of de jure Karnavan—Necessity—Death of consenting de jure Karnavan—Effect—Suit to remove Karar manager who is not de jure Karnavan—Junior member's right to maintain—Reservation in Karar of member's right to sue to enforce Karar—Effect.

The removal of a *de jure* Karnavan on the ground that he acted against the provisions of a family Karar restricting his powers can be justified only if the violation by him of the Karar terms was of so gross a character that it constituted serious misconduct on his part. The Court must be satisfied that the interests of the tarwad have been and would (in the future) be seriously jeopardised by his past acts and his probable future conduct and that his removal is required in the interests of the tarwad.

Where all that was proved against the Karnavan in effect was that he had not been a very careful manager and he gave an undertaking to look after the tavazhi affairs in future more diligently the Court declined to remove him.

Courts have no power without the consent of the *de jure* Karnavan to impose conditions on him and to pass a conditional decree that "if the Karnavan sets right the mischief committed by him by following certain directions, the suit for his removal would be dismissed, but that otherwise, he would be removed."

* A. Nos. 126, 200 and 208 of 1914. 30th October, 1916.

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No suit lies to remove a Karar manager who is not the de jure Karnavan.

A family Karar entered into by a majority of the members of a tarwad with the consent of the de jure Karnavan is not binding on a dissentient member in so far as it seeks to restrict his right to succeed to the full powers of a Karnavan in the natural course of events or if it interferes with his right to reasonable provision for maintenance; in all other respects it is binding.

The Karar falls to the ground on the death of the *de jure* Karnavan who consented to be bound by it (or his removal by decree of Court) and the next *de jure* Karnavan is not bound by the restrictions imposed by the Karar on his predecessor except perhaps where he himself has agreed in that Karar to be bound by those restrictions whenever he succeeded to the stanom.

The adult members of the tarwad have it in their power with the consent of the *de jure* Karnavan to vary the terms of the Karar by a majority vote taken in a family Council.

Per Sadasiv Aiyar, J.—Every junior member of a tarwad cannot bring a suit for settling schemes for the management of his tarwad properties and for the removal by Court from the office of manager a person whose rights to so manage are founded solely on a family Karar.

Per Napier, J.—In the absence of a special provision in a family Karar reserving to any of its signatories the right to bring a suit, to enforce the Karar a junior member cannot maintain it. The proper person to enforce the Karar against the Karar manager is the *de jure* Karnavan.

Semble, Contra if the Karar reserves such a right.

Per Sadasiva Aiyar, J.—Unless the Karnavan himself is disabled from suing to recover possession of or obtain other relief regarding the tarwad property, an anandravan cannot be allowed to sue on behalf of the tarwad for the relief claimable by the tarwad in respect of the tarwad property, nor can he be allowed to sue for a mandatory injunction requiring the Karnavan to act in a particular way.

Appeal against the decree of the Court of the Subordinate Judge of South Malabar at Palghat in Original Suit No. 48 of 1916.

J. L. Rozario and *K. Kutti Krishna Menon* for Appellant.

C. Madhavan Nair, C. V. Anantha Krishna Aiyar, A. Sivaraman Menon and *P. Appu Nair* for Respondents.

The Court delivered the following

Sadasiva Aiyar. J.

Judgments :—*Sadasiva Aiyar, J.*—These three connected appeals have arisen out of a suit brought by 4 junior members of a sub-tarwad or tavazhi. (The other plaintiffs 5 to 16 are minors whose next friend is the first plaintiff and they have been added merely to swell the numerical figure of the plaintiffs on the record). The plaint concludes for the following main reliefs;—(*a*) for a declaration that on account of the actual mis-management of the defendants 1 and 2 and of their acts in contravention of the provisions of the family karars (Exhibit B dated 30th June 1894), the defendants 1 and 2 are unfit to be tavazhi managers; for removal of the defendants 1 and 2 from management and for the appointment

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of the 1st plaintiff as manager; (*b*) for directions to the defendants 1 and 2 to render accounts from the date of Exhibit B (1894); to pay to the plaintiffs 1 and 2 the moneys of the tavazhi in the hands of the defendants 1 and 2 and for a return of all the documents relating to the tavazhi and (*c*) for directing the defendants 1 and 2, in case both or either of them are not removed from the management by the Court, to pay to the plaintiffs 1 and 2 the sum found due on settling the accounts in order that the said funds may be properly invested on behalf of the tavazhi as provided in the karar. (There are other minor appurtenant reliefs claimed in the plaint but it is unnecessary to set them out in detail).

The lower Court by its decision removed the 1st and 2nd defendants from management (they having been respectively the karnavan *de jure* and the senior anandravan in the tavazhi), the Court then passed over the next two anandravans in order of seniority, namely, the 1st plaintiff and the 5th defendant, (the 2nd plaintiff being now dead) and it finally appointed the 6th defendant as manager of the tavazhi and invested him with all the powers given to both the 1st and 2nd defendants under the karar (Exhibit B). It also gave some further consequential directions to the defendants 1 and 2 besides the directions as to the costs of the suit.

Of the three appeals before us, the most important, namely, Appeal No. 208 of 1914 is by the 1st defendant contesting the validity of his removal. Appeal No. 126 of 1914 is by the 2nd defendant to contest his removal from the office of joint managership given to him by the karar and to secure the karnavanship for himself if the 1st defendant's removal be upheld. Appeal No. 200 of 1914 is in substance an appeal by the 1st plaintiff in his own individual interest (though he has added the minor plaintiffs 5 to 16 as his co-appellants for the same reason for which he added them as co-plaintiffs in the lower Court). In this appeal, the 1st plaintiff contests his supersession by the lower Court in favour of the 6th defendant and also the order as to costs so far as it affects the plaintiffs. Again in the course of the argument of the appeals before us, the 5th defendant who is one of the respondents in all the three appeals argued against his supersession by the 6th defendant.

I shall first take up the 1st defendant's Appeal No. 208 of 1914. The learned Subordinate Judge clearly fell into an error in

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supposing that the 1st defendant was merely a manager under the Karar, Exhibit B, and has never had any higher rights. The lower Court's judgment in paragraph 10 states "On its date" that is the date of the Karar (30th June 1894,) "neither the 1st defendant nor the 2nd defendant was the Karnavan but one Valia Pangi Achan was the Karnavan." This is admittedly erroneous as Valia Pangi Achan, the former Karnavan, had been removed by a decree of Court some time before date of Exhibit B. (See the recital in Exhibit B itself). The 1st defendant, the next in age, became at once the *de jure* Karnavan and was such Karnavan on the date of Exhibit B. Paragraph 4 of the karar states that the 1st defendant was then "conducting the affairs of the tavazhi rightly." Paragraph 1 of Exhibit B again shows that the 1st defendant's management was the management of a *de jure* Karnavan and that the karar merely imposed restrictions on some of the powers as Karnavan, and did not, for the first time, give any powers which he did not possess before. The removal of a *de jure* Karnavan on the ground that he acted against the provisions of a family karar restricting his powers, can be justified only if the violation by him of the karar terms was of so gross a character that it constituted serious misconduct on his part. The mere fact that he did not conform to some of the terms of the karar through carelessness, would not be a sufficient ground for the removal of a *de jure* karnavan or ejaman. The Court must be satisfied that the interests of the tarwad have been and would (in the future) be seriously jeopardised by his past acts and his probable future conduct and that his removal is therefore required in the interests of the tarwad. The learned Subordinate Judge seems to have thought (*see* paragraph 10 of his Judgment) that the provisions of the karar should be strictly construed against the 1st defendant and that the 1st defendant would render himself liable for removal "for any the least and slightest violation of the terms of the Karar imposing duties on him." He thinks (as pointed out before) that the office of manager was one conferred on him solely "by trust or contract" and was not "the offspring of his natural condition" as the senior Anandravan on the removal of the former Karnavan. The judgment of Benson and Bashyam Aiyangar, JJ. in Appeal Suit No. 61 of 1901 is to the effect that the natural ejaman of an Alyasantanam family ought not to be removed from his position simply because he carelessly violated some of the terms of a family karar.

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Now the plaintiffs brought against the 1st defendant several charges lettered as follows:—Charges A to C (3 in number); 10 charges under letter D; and seven charges lettered E, F, G, H, I, K and L; that is, a total of about 20 charges. The learned Subordinate Judge found all but six charges not proved. Mr. Anantakrishna Aiyar for the respondent tried (as he was entitled to do) to support the lower Court's Judgment, not only on the six charges but also on two or three of the fourteen charges rejected by the lower Court. It is sufficient to state that I agree with the lower Court in its conclusion that all the other fourteen charges are either not proved or are absolutely flimsy. As regards the six charges upheld by the lower Court, they are charges D, D8, D9, I, K and L. D and L might be taken together as they relate to the same matter. The Subordinate Judges finding under this head is that, though the 1st defendant's accounts were on the whole kept truly, his omission to recover the annual surplus income as regards the properties in the management of the 2nd defendant (according to the stipulations in the karar, Exhibit B) has rendered the 1st defendant liable to removal. Seeing that the omission to recover the surplus income from the 2nd defendant (who says that he was prohibited by the plaintiffs 1 and 2 themselves from handing over the surplus to the 1st defendant) has not caused any material injury to the tarwad and that the 2nd defendant has invested the larger portion of the surplus amounts (in his hand) in proper securities, I am not inclined to hold that this charge is sufficiently serious to justify the removal of the 1st defendant who seems to have kept very proper accounts.

Coming next to charge D8, it is a trivial and futile charge. The charge is that the 1st defendant ought not to have spent moneys on the tending of the tavazhi cattle and on the performance of Sraddhas (though they are admitted to be necessary tavazhi expenses), because the 2nd defendant was the person bound under the karar to have spent those moneys. The 1st defendant's duty as Karnavan included the performance of the usual religious Sraddhas for the deceased tavazhi members. He was also bound to supply the defects in the 2nd defendant's management and to look after all the tarwad necessities even though it might have been the primary duty of the 2nd defendant under the karar to look after some of them. As regards charges D9 and I, which

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go together, there is no evidence worth the name that the wooden materials for house construction found in the 1st defendant's wife's compound were fashioned out of the timbers cut from the tavazhi karakat kalom compound. The remaining charge K is a joint charge against the defendants 1 and 2 that they did not continue the subscription to a kuri fund and that thus the tavazhi lost the benefit which a regular subscriber to a kuri fund is expected to obtain and also sustained some loss of interest on the amount actually subscribed, the kuri being only bound to return that amount *without interest* at the end of the term of the kuri. Though the 1st defendant might not have been quite straightforward when he repudiated all responsibility for the kuri transaction (see Exhibit 20 and Exhibit T.), his explanation that it was the 2nd defendant who was primarily responsible for the regular payment of subscriptions to the kuri is not an unreasonable one. As the learned Subordinate Judge says "the discontinuance of the payment of subscriptions must be due to the quarrels between the two defendants." The loss of interest on Rs. 300 (the amount of the paid-up subscriptions) seems to have been comparatively insignificant and no other loss to the tavazhi is proved. The defendants 1 and 2 were not bound to have joined the kuri at all and I cannot hold that the negligence proved against the 1st defendant under this minor charge is sufficient to support his removal.

Thus out of the nominally 6 but really 4 charges sustained by the lower Court against the 1st defendant, two have not been proved in my opinion and the other two are insufficient to justify his removal. As I have said more than once, the lower Court erroneously thought that it was bound to dismiss the 1st defendant if he failed in the slightest degree to act up to the terms of the karar. I would therefore allow the appeal, especially as the 1st defendant agreed through his counsel to give reasonable undertakings as to his future conduct. In Appeal Suit No. 20 of 1910 decided by Miller, J. and myself, the facts in some respects were similar to the facts of the present case. The 1st defendant in that case also was the karnavan of his tarwad and his powers had been restricted by a family karar. One of the numerous charges against the 1st defendant in that case was (curiously enough) that he neglected to continue to subscribe to a kuri. Miller, J. says about the end of his judgment in that case allowing the appeal of the 1st defendant (who was removed by the lower Court's

decree):—"All that is shewn is that the 1st defendant has not been a very careful manager, but, as he has agreed through his counsel, we can put him upon terms which should be enough to secure an improvement, and there is nothing to support that the plaintiff is likely to be a better manager. Therefore I would allow the appeal and dismiss the suit allowing the 1st defendant to be in office on conditions to which his counsel agreed" etc. In this case I have understood Mr. Madhavan Nair (1st defendant's counsel) to have given an undertaking for his client that the 1st defendant would take steps, say within 6 months, to recover the amounts due to the tavazhi by the 2nd defendant and to invest the same on proper securities as mentioned in the Karar (Exhibit B) within a reasonable time after its recovery and see that the investments already made by the 2nd defendant in his own name, though on behalf of the tavazhi, are transferred by proper documents to the joint names of the four persons mentioned in the Karar, namely, the defendants 1 to 4.

I do not think that Courts have got the power without the consent of the *de jure* Karnavan to impose conditions on him and to pass a conditional decree that "if the Karnavan sets right the mischief committed by him by following certain directions, the suit for his removal would be dismissed, but that otherwise, he would be removed." It is fallacious in my opinion, to attempt such decrees on the analogy of suits for the dismissal of trustees of temples or for the removal of guardians of minors. The tarwad, in these days is not even a natural family and has become almost an "artificial family" and the same indulgences, as are shown by the legislature and the Courts in the case of trusts properly so called cannot be extended to it. As I said before, 1st defendant through his counsel has very properly given his consent and undertaking to look after the tavazhi affairs in future more diligently. I would, in the result, allow the 1st defendant's appeal and dismiss the suit as against him. Costs of the plaintiffs and of the 1st defendant in this appeal and in the lower Court to come out of the Estate.

Appeal No. 126 of 1914.

This is the appeal of the 2nd defendant. At the very commencement of the hearing of these appeals a doubt suggested itself to our minds as to whether in respect of a person who obtained his authority to manage some of the affairs of his tarwad

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solely on the strength of a family karar, a suit could be sustained for his removal by the Court from that position. A tarwad is not a public religious or charitable trust nor a company under the Indian Company's Act nor can such a karar manager be treated as an officer of a company. A tarwad or tavazhi cannot be called even a private trust managed by a private trustee or private trustees. Suits for the removal of a *de jure* karnavan have been permitted for a long time past (see 1 Sudder decisions 118, No. 28 of 1814 decided about 100 years ago) evidently on the ground that there exists no other remedy available to the other tarwad members who cannot sue for partition of the tarwad property. But family karars entered into by a majority of the members of the tarwad with *the consent of the de jure karnavan* seem to have been upheld as binding on the whole tarwad. (See *Kanna Pisharodi* v. *Kombi Achen* [1].) Exhibit B in this case is a family karar of that kind. (I find that the removed karnavan Valia Pangi Achan was not a party to this karar and yet its validity is not disputed). It was suggested during the course of the argument that a family karar unless assented to by every one of the adult members is wholly invalid or, is at least not binding on the dissentient members. It may not be binding on a dissentient member so far as it seeks to restrict his right to succeed to the full powers of a karnavan in the natural course of events or if it interferes with his right to reasonable provision for maintenance but I do not see why, when the karnavan *de jure* is a party to the scheme of management assented to by a majority, it should not be binding on every member of the tarwad in all other respects. I think it follows that the adult members of the tarwad have it in their power with the consent of the *de jure* karnavan to vary the terms of the karar by a majority vote taken in a family council. They have, of course, also got the well established right by suit to have the karnavan *de jure* (whether his powers are or are not restricted by a family karar) removed from his position in the interest of the tarwad if he is guilty of gross misconduct. The whole of a family karar in my opinion falls to the ground on the death of the *de jure* karnavan who consented to be bound by it (or his removal by decree of Court) as the next *de jure* karnavan is not bound by the restrictions imposed by the karar on his predecessor except perhaps where he himself has agreed in that karar

1. (1885) I L. R. 8: M. 381.

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to be bound by those restrictions whenever he succeeded to the stanom. In Ramachandra Aiyar's book on Malabar Law, page 111 it is said quoting Second Appeal 766 of 1882 and Second Appeal 664 of 1882 that "unless the karnavan consents to surrender his ordinary functions, the Court ought not to impose conditions upon him as regards acts of future management." The lower Court seems to have thought that a tarwad was like a temple and the Court has practically settled a scheme for the management of the plaint tavazhi removing the defendants 1 and 2 from their positions (which it considered analogous to the positions of trustees of a temple) and has appointed the 6th defendant as manager as the fittest man for the office. Two or three unreported cases have been cited before us in which *by consent of all parties* this Court passed decrees for the future management of tarwads. I do not think those cases oblige us to hold that every junior member of a tarwad could bring a suit for settling schemes for the management of his tarwad properties and for the removal by Court from the office of manager a person whose rights to so manage are founded solely on a family karar. The legislature has passed special Acts for the protection of the estates of minors and lunatics and of temples and mosques and has enacted provisions in the Civil Procedure Code for bringing suits with the consent of the Advocate General or the Collector to settle schemes of management for temples and mosques and has passed Acts for winding up registered and other companies. As regards private trusts also, Section 34 of the Trusts Act gives a trustee power "to apply by petition to a principal Civil Court of original jurisdiction for its opinion, advice or direction on any present questions respecting the management or administration of the trust-property other than questions of detail, difficulty or importance". I am not disposed to encourage the notion that suits in the nature of those mentioned in Section 14 of Act 20 of 1863 can be brought for the removal of private managers of tarwads or other private estates as if those estates were religious and charitable institutions. Even a suit under section 14 can be brought only after obtaining the sanction of the District Court under S. 18. I would therefore hold that the suit so far as it prays for the removal of the 2nd defendant from his post of manager is totally misconceived and must be dismissed.

As regards the prayer for directing the 2nd defendant to submit accounts of his management and for making him conform

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to the terms of the Karar, the plaintiffs junior (members) cannot be allowed to maintain such a suit.

The 2nd defendant was, no doubt, bound to account to the 1st defendant under the Karar (1st defendant also representing the tavazhi in Courts of justice as *de jure* Karnavan), but a suit on behalf of the tavazhi to enforce those obligations of the 2nd defendant under the Karar can be brought only by the *de jure* karnavan, the 1st defendant, and cannot be brought by the plaintiffs. Unless the karnavan himself is disabled from suing to recover possession of or obtain other relief regarding the tarwad property (as in a case where the property was alienated by himself to a stranger), an Anandravan cannot be allowed to sue on behalf of the tarwad for the relief claimable by the tarwad in respect of the tarwad property, "nor can he be allowed to sue for a mandatory in junction requiring the karnavan to act in a particular way for that would be to ask the Court to substitute its discretion for his." I would therefore allow the appeal of the 2nd defendant and dismiss the plaintiff's suit wholly against him. The parties will bear their respective costs in this appeal and the 2nd defendant will bear his own costs in the lower Court as his conduct has been contumacious throughout towards the 1st defendant, the *de jure* karnavan.

Lastly we come to the Appeal No. 200 of 1914 filed by the 1st plaintiff and to the contentions of the 5th defendant as respondent in respect of their supersession by the 6th defendant. As I have held that the lower Court's removal of the 1st defendant from his position (as a karnavan with the powers limited by the family karar) cannot be sustained, it becomes unnecessary to deal with the contentions of the 1st plaintiff and the 5th defendant in detail. I shall only quote a few passages from a very learned contribution to the Madras Law Journal (Volume XI, page 137 with which I agree. "In some cases the Court, while it makes a decree to remove a Karnavan, also appoints another Karnavan generally, the next senior member, but sometimes it pronounces him to be unfit for the office and appoints some other member. Sometimes it even appoints two members. It seems to us that this is illegal and that the Court has no power to do so. When the Court removes the karnavan, the next eldest member of the tarwad is by right entitled to succeed. He requires no appointment by the Court and the Court has therefore no power to appoint him. The right to the karnavanship goes by nature to each member in succession and the Court has no power to disturb

the order. And any misconduct before his succession to office in relation even to the tarwad properties is no ground to deprive him of his office. The appointment of two persons as karnavan is equally unjustifiable." — Cheria Pangi Achan v. Unnalachan. — Sadasiva Aiyar, J.

I would, in the result, dismiss this appeal, the parties bearing their own respective costs, except the costs of the 6th defendant (who shall get his costs—one set) in both Courts out of the estate.

Napier, J:—I entirely agree with the findings of fact arrived at by my learned brother and the law as laid down by him with regard to the position of the 1st defendant, the *de jure* karnavan, and also in the view that no suit will lie to remove a Karar manager who is not the *de jure* Karnavan. I have had some doubt whether the plaintiff could not bring a suit against the latter on the Karar. I will not say that if a right was reserved by a Karar to any signatory to bring a suit it could not be enforced; but I agree with my learned brother that in the absence of such a special provision the proper person to enforce the Karar against the Karar manager is the *de jure* Karnavan. I agree in the decrees and the orders for costs proposed by my learned brother. — Napier, J

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

Present:—Sir John Wallis, Chief Justice, Mr. Justice Sadasiva Aiyar, and Mr. Justice Seshagiri Aiyar.

S. Sundaram Ayyar, Receiver of the Tanjore Palace Estate.	*Petitioner in all the Civil Revision Petitions* * (*Plaintiff.*)
v.	
Ramachandra Ayyar and others.	*Respondent in Civil Revision Petition No. 427 of* 1916. (*Defendant.*)

F. B. — Sundaram Ayyar v. Ramachandra Ayyar.

Madras Estates Land Act (I of 1908) S. 3 (2)—"Tanjore Palace Estate", if an "Estate"—Granted in Inam—Irresumable grants, if within the Act.

The Tanjore Palace Estate, having been confiscated and granted afresh in 1862 by the British Government as an act of grace and favour, to the widows of the late Rajah of Tanjore and his other heirs, must be deemed to have been "granted in inam." Consequently where the *kudivaram* of a village forming

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* C. R. P. Nos. 427 to 435 of 1916. 18th January 1917.

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part of the Tanjore Palace Estate has all along been with the tenants on the land, the village comes within the definition of estate in S. 3 (2) (*d*) of the Madras Estates Land Act.

It was not the intention or the policy of the Legislature to exclude from the operation of S. 3 (2) (*d*) of the Estates Land Act, grants which are irresumable.

Sundaram Iyer v. Deva Sankara Bhutt [1] (1915) S.A. 2661 of 1913, overruled.

Civil Revision Petitions Nos. 247 to 435 of 1916 under Sec. 115 of Act V of 1908, praying the High Court to revise the decrees of the District Court of Tanjore in Appeal Suits Nos. 721 to 727, 432 and 425 of 1915 respectively, preferred against the decrees of the Court of the Revenue Divisional Officer of Kumbakonam in Rent Suits Nos. 27, 29, 32 to 34, 36, 51, 4 and 2 of 1914 respectively.

The facts material to this report are these. In the year 1799 Rajah Serfoji, the then reigning king of Tanjore, unable to discharge the debts due to the East India Co. and to carry on the administration of the country, entered into a treaty with the East India Co. by which he ceded the collection of revenues and the administration of justice throughout his territories with the exception of the fortress of Tanjore, to the East India Co. in consideration of the latter paying him a fifth of the net revenues and a lakh of star pagodas annually. The treaty is given *in extenso* in Aitchison's Treaties etc. Vol. X p. 90. By an arrangement come to at the time of the cession aforesaid, the Raja was allowed to retain "certain extensive and highly cultivated villages ....under the plea that they were gardens and pleasure grounds accessory to his ease and comfort" and the E. I. Co. refrained from enforcing its rights under the treaty of 1799, in respect of these villages. After Serfoji's death, his son Sivaji continued in possession of the villages aforesaid till 1855 when he died leaving a large number of widows but without male issue. The Raj was thereupon declared extinct by the Board of Directors in their despatch dated 16-4-1856 and a Commissioner appointed for the purpose, took charge of all the properties, real and personal, of the Rajah on 18-10-1856. On 18-11-1856 Kamachee Boye Sahiba, the senior widow of the late Rajah, filed a Bill on the Equity side of the Supreme Court at Madras, against the E. I. Co., for a declaration that she was entitled under the Hindu Law, as the eldest widow of the late Rajah, to inherit and possess his private Estate including the lands retained at the

1 (1915) 32 M. L. J. 336.

time of the cession, and for an injunction. The Supreme Court at Madras gave her a decree as prayed for, but on appeal their Lordships of the Privy Council reversed that decree and dismissed the suit on the ground that the seizure even of the private property of the late Rajah by the E. I. Co. was an act of State over which the Supreme Court of Madras had no jurisdiction. The decision of the Privy Council is reported in 7 Moore's Indian Appeals 476. Subsequently, the Government of Madras, acting in accordance with the directions of the higher authorities, resolved by their proceedings dated 21-8-1862 to "relinquish" the whole of the lands aforesaid in favour of the heirs of the late Rajah. The material portion of the Order of Government was as follows: "The estate will therefore be made over to the senior widow, who will have the management and control of the property..........On the death of the last surviving widow, the daughter of the late Rajah, or failing her, the next heirs of the late Rajah, if any, will inherit the property.". The lands originally retained by Raja Serfoji at the time of the cession of 1799 and subsequently restored to the widows of Sivaji by the Order of Government form what is generally called "The Palace Estate," or "The Mokhasa Palace Estate", Tanjore. The lands are now in the possession of a Receiver, who instituted the rent suits which gave rise to these Civil Revision Petitions, under S. 77 of the Madras Estates Land Act, in a Revenue Court. The District Judge, on appeal, held on the authority of S. A. 2661 of 1913 decided by the High Court, that the Tanjore Palace Estate was not an "estate" within the meaning of the Madras Estates Land Act and returned the plaints to be presented in a Civil Court. The plaintiff (Receiver) preferred Civil Revision Petitions against the orders of the District Judge.

(These petitions came on for hearing in the 1st instance before Ayling and Seshagiri Aiyar, JJ.)

The Court made the following

ORDER OF REFERENCE TO A FULL BENCH

Ayling, J. *Ayling, J*:—These petitions involve the consideration of a single point only, but one of great and far-reaching importance, namely, whether the Tanjore Palace Estate is an estate within the meaning of S. 3 (2) of the Madras Estates Land Act I of 1908.

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The suits out of which they arise were filed under the provisions of Section 77 of that Act in the Court of the Revenue Sub-Divisional Officer of Kumbakonam. No question of jurisdiction was raised in that Court; but, on appeal to the District Judge, the latter, apparently of his own initiation, raised the point, and decided that the Tanjore Palace Estate was not an estate within the meaning of the Madras Estates Land Act: and that, in consequence, the Revenue Court had no jurisdiction. He accordingly returned the plaints for re-presentation to the proper Court. This is the order which is sought to be revised.

The District Judge relied solely on a recent unreported decision of a Bench of this Court in Second Appeal No. 2661 of 1913,* which, on the face of it, is clear authority on the point. The petitioner's Vakil was forced to contend that the decision was wrong, and some argument was addressed to us on both sides regarding this. Speaking for myself, I do not think I should have felt justified, as a result of that argument, in refusing to follow that decision, if it had been reported in the authorised series. But at the very end of the argument, we found that the learned Judges had declined to allow the case to be reported on the ground that it had not been fully argued. In these circumstances, we felt some difficulty as to the best course

* IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

Sundaram Iyer, Receiver and Manager,
Palace Estate, Tanjore ... ... Appellant† (Plaintiff.)
v.
Deva Sankara Bhut ... ... Respondent (Defendant.)

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Tanjore in Appeal Suit No. 1028 of 1911 preferred against the decree of the Court of the District Munsif of Tanjore in Original Suit No. 344 of 1908.

T. R. Venkatarama Sastri for Appellant

G. S. Ramachandra Iyer for Respondent.

Judgment:—*Napier, J.*—This was a suit by the Receiver of the Tanjore Palace Estate to recover possession of certain lands in the possession of the defendant alleged by the plaintiff to be held on a tenancy from year to year. The defendant relied on the terms of the Muchilika Exhibit A dated June 13, 1889, given to him by the Public Works Department authorities, as creating a permanent tenancy and alternatively contended that he was entitled to permanent rights of occupancy under the Madras Estates Act. The Lower Appellate Court found that the defendant had a right of occupancy and the plaintiff appeals. Both defences are relied on in this Court. [His Lordship proceeds to deal with the

† S. A. No. 2661 of 1913. 23rd November, 1915.

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to adopt. The argument addressed to us was certainly not of such a nature that we should like to base the decision of an important point on it. Both the learned Vakils were clearly to some extent influenced by the existence of the previous decision. I should not be prepared to come to a different conclusion without a much more exhaustive consideration of the question. The importance of the point has already been referred to. The Tanjore Palace Estate embraces nearly 200 villages and extends over a large tract of country. I believe it has been assumed, from the very enactment of Act I of 1908, that it came within the scope of the latter's operation as an "estate": and the number of decisions of this and subordinate Courts based on this assumption must be very large. In fact the dislocation and confusion which would be the logical result of the unreported decision being followed are so great, that the necessity of resort to legislation might have to be considered.

In these circumstances I think we are justified in referring the question to a Full Bench and would state it as follows:—

Whether the Tanjore Palace Estate is an "estate" within the meaning of Sec. 3 (2) of Act I of 1908?

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contention based on Ex. A, which however, is not material to the report]. The next contention has raised very large questions as to the nature of the interest vested in the Tanjore Royal Family in these lands by their restoration to the Family, and the effect of the Act of State on the rights of the tenants in possession. We do not propose to consider these questions as we are satisfied that the Estate does not come within the purview of the Madras Estates Act at all, whether the kudivaram interest is vested in the estate or not. It is clearly not within clauses a, b and c, of section 3. The only clause that could possibly apply is clause (d), "any village of which the land revenue alone has been granted in Inam to a person not owing the kudivaram thereof, "provided that the grant has been made, confirmed or recognised by the British Government." The history of the grant is well-known and is to be found in the reports in—*The Secretary of State in Council of India* v. *Kamakshi Boye Sahiba* 7 Moore's Indian Appeals 476 and *Jijoyiamba Boyi Sahiba* v. *Kamakshi Boye Sahiba* 3 M. H. C. Reports 424. The Governor-in-Council in exercise of the Sovereign rights of the Crown made over the Estate to the senior widow with succession to the daughter of the late Rajah or failing her, the next heirs of the late Rajah (vide 3 M. H. C. R., page 430). It was held in that case that this grant was a grant of grace and favour by Government (vide p. 445) and this language does accord with the natural meaning of the word "Inam." We are satisfied however that we have not to look to the natural meaning of the word in construing the clause. "Granted in Inam" is a phrase with which the Courts are very familiar and Inam has acquired a definite meaning since the Inam settlement. It was pointed out in argument that a forfeited Zamindari when regranted is broadly speaking "granted in Inam" but it is never called an Inam. One peculiar feature

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Seshagiri Aiyar, J.—The short point is whether the Tanjore Palace Estate is an *Estate* within the meaning of that expression in Sec. 3 (2) of Act I of 1908. There can be no doubt that it is not covered by clauses (a), (b), (c) and (e). Does it come under clause (d)? The proprietor, by whatever name he might have been known in the past, does not own the kudivaram right in the village in his possession. It is conceded that the grant to him was only of the land revenue. It was a grant, if any, by the British Government. The further question is whether the villages were granted *in inam*. Before dealing with this question it may be stated that it is not conceded that there was any grant by the Government. Mr. G. S. Ramachandra Aiyar suggested that it was a case of a retention of a portion of the Raj and the relinquishment of the rest to the British Government. It may also be put the other way. See Hickey's book on the Tanjore Palace Estate, Appendix C3, and also *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba* [1]. Assuming that there was a grant, *was it an Inam grant?*

In Second Appeal No. 2661 of 1913, Sadasiva Aiyar and Napier, JJ, held that the villages belonging to the estate did not

in Inams has always been the intention of the Government to reserve a reversionary right whether the grant be personal, service or religious. When the grant is personal, that right has been the subject of enfranchisement by the Commission. Could it be suggested that Government has at any time contemplated the position that enfranchisement would give a better title to the heirs of the late Rajah. Both the circumstances of the grant and its subsequent treatment are against any such supposition. The language of the despatch of the Secretary of State of October 23, 1852 was that "His Majesty's Government was willing to relinquish to the surviving members of the late Prince's family the benefits accruing from these possessions." The word "relinquish" is I think indicative. Nowhere is the grant termed Inam, whereas later on in the same despatch the Secretary of State approves of the decision of the Madras Government that "certain alienations of the nature of Inam should be dealt with by the Inam Commissioner." In the District Manual, the Mukasa (as it is there rather loosely termed) although stated to be treated for all practical purposes as an unenfranchised Inam is carefully distinguished from Inams properly so called. To conclude, the nature of the Estate is far more analogous to a permanently settled Estate though there is of course no revenue liability on it. We cannot include it in the class dealt with in clause (d) merely because of the literal meaning of the word Inam. The respondent therefore cannot treat it as an Estate and his claim to permanent rights of occupancy fails. The second appeal will be allowed with costs, plaintiff being given a decree for possession with mesne profits at Rupees seven per annum from April 1st 1908 till delivery in execution or three years from this date whichever first occurs.

Sadasiva Aiyar, J: —I concur.

1. (1868) 3 M. H. C. R. 424.

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come under clause (d). In that case the point was conceded in the Courts below and was only incidentally raised in the High Court. Consequently the question was not fully argued. I was informed by one of the learned Judges that the decision requires reconsideration. The other learned Judge in refusing to give permission to publish the decision in the Indian Law Reports has left a note that the case was not fully argued. None the less, the decision has been followed by the District Judge in the present case; and we are informed that a large number of cases await the decision of this case.

The matter in controversy relates to the meaning to be attached to the term "*granted in Inam.*" The learned Judges inclined to the view that, unless there is the incident of resumability, there can be no Inam. The meaning given in Wilson's Glossary does not support this view. In *Unide Rajaha Raje Bommarauze Bahadur* v. *Pemmasamy Venkatadry Naidoo*, [1] the Judicial Committee seem to contemplate an Inam which may not be resumed.

I am not prepared to accept Mr. Krishnaswami Aiyar's contention that there can be no Inam unless it be conferred by the Government. I do not understand *Raghojirao Saheb* v. *Lakshmanrao Saheb*, [2] laying down such a proposition. The learned Vakil argued that it is of the essence of an Inam that it is permanent. It may be that permanency and heritability attach to an Inam so long as it is not resumed. The observations of Bashyam Aiyangar, J. in *Gunnaiyan* v. *Kamatchi Ayyar*, [3] were relied upon for the proposition that the Government has no right to resume even a service Inam As at present advised, I am not prepared to accede to this proposition. What was held in that case was that by the enfranchisement there was no resumption and regrant. I do not understand that decision as laying down that the Government could not have resumed the land under any circumstances. See *Boddupalli Jagannadham* v. *The Secretary of State for India in Council* [4] and *Subramanian Chettiar* v. *The Secretary of State for India in Council*, [5] and *Tadikonda Buchi Virabhadrayya* v. *Sonti Venkanna* [6].

1. (1859) 7 M. I. A. 128, p. 138.
2. (1912) I. L. R. 36 Bom. 639.
3. (1902) I. L. R 26 M. 339.
4. (1903) I. L. R. 27 M. 16.
5. (1915) M. W. N. 276.
6. (1913) M. W. N. 782.

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On the other hand, there is no authority for saying that, unless a grant possesses the characteristics of resumability, it should not be regarded as an Inam. In the Fifth Report of the Madras Presidencey, Volume II, page 14, the nature of the Inam or beneficial grants is stated at some length. It is clear that the Moghul Government made non-resumable Inam grants. That the British Government, in the earlier years of its administration, granted many Inams is evident from numerous grants made by them. This practice was objected to by the Board of Directors in 1822 and 1829 and was practically abandoned since then. There is no reason for supposing that the grants by the British Government always partook of the character of resumability.

It is not necessary to discuss the matter much further, as, in my opinion, the question is one of great importance and should be settled by a Full Bench of this Court.

I agree, therefore, that the question suggested by my learned brother should be referred to the decision of a Full Bench.

[These Civil Revision Petitions came on for hearing, in pursuance of the above order, on Wednesday, the 10th day of January 1917.]

The Hon'ble The Advocate-General (*S. Srinivasa Aiyangar*) and *K. V. Krishnaswami Iyer* for petitioner:—The Tanjore Palace Estate comes within S. 3 (2) (d) of the Madras Estates Land Act and is an estate. It is conceded that the Kudivaram of the villages in the Estate has all along been with the tenants on the land and not with the plaintiff.

[*G. S. Ramachandrier* pointed out that the concession was with regard to the village of Ullikadai alone and that there were other villages in the Tanjore Palace Estate, the Kudivaram in which has all along been with the estate.]

The only question is whether the Tanjore Palace Estate has been granted in Inam. "Inam" originally meant a permanent alienation of the entire assessment or land revenue. Gradually it came to mean any beneficial alienation of assessment, whole or partial, in favour of a subject.

[*Chief Justice.*—'Inam' means a gift or present.]

Literally it is so.

[*Chief Justice.*—Here is a grant by the British Government.]

Yes, and only of the assessment.

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[*Sadasiva Aiyar, J.*—Why? there must have some difference between the private and state properties of the late Raja of Tanjore.]

The private properties are those which were retained by the Rajah at the time of cession. Tanjore District Manual, p. 680.

[*G. S. Ramachandra Aiyar* referred to Tanjore District Manual, p. 824.]

[*Chief Justice*.—If there has been a seizure by the Government and if the property is now found in the lawful possession of the heirs of the late Rajah, it must only be by a grant from the Government.] There has been a fresh grant in 1862. *Jijoyiamba Bayi Sahiba* v. *Kamakshi Bayi Sahiba* 1 treats it as a fresh grant and as an act of grace and favour. *The Secretary of State for India* v. *Kamachee Boye Sahiba* 2 put an end to all the rights of the Rajah and his heirs in respect of the properties in question.

Kaliana Sundaram Iyer v. *Umamba Ba iSahiba* 3, follows *Jijoyiamba Bayi Sahiba* v. *Kamakshi Bayi Sahiba*, 1. No legal rights can exist after an act of State and any rights must be traced only to the fresh grant.

[*Sadasiva Aiyar, J.*—"Inam" involves a reversionary right in the sovereign power. See preamble to Madras Act IV of 1862.]

[*Chief Justice.*—Where is the authority for that view.]

In the majority of the Inams the Crown had a reversionary right.

[*Chief Justice*:—Whether it is a *lakhiraj* grant, is a different question.]

[*Sadasiva Aiyar, J.*—Did the Inam Commissioner deal with this Inam ?]

[*Chief Justice.*—There was nothing payable by the grantee and there was nothing for the Commissioner to settle.]

[*Sadasiva Aiyar, J.*—A Zemindary though granted by the Government, is not an Inam.]

Because in theory at any rate, the full assessment has been imposed. S. A. No. 2661 of 1913 proceeds on the view that resumability is essential to an Inam. That view is erroneous. 'Inam' is a term of very wide import. Wilson's Glossary, p. 217; Fifth Report, Vol. 2, p. 14; *Unide Rajaha Raje Bommaraza*

1. (1868) 3 M. H. C. R. 424, 445. 2. (1859) 7 M. I. A. 476.
3. (1897) I. L. R. 20 M. 421, 432=7 M. L. J. 324.

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Bahadur v. *Pemmasami Venkatadri Naidu* [1], *Raghojarao Saheb* v. *Lakshmanrao Saheb* [2], *G. Sam* v. *Ramalinga Mudaliar* [3], *Krishnarao Ganesh* v. *Rangarao and another* [4], *Gunnaiyan* v. *Kamatchi Iyer* [5]. Reference was made to Madras Act IV of 1862 and IV of 1866.

[*Chief Justice.*—This might be termed a Jagir. What is the difference between an Inam and a Jagir?]

Inam is a grant of a small village. Jagir is a dignified form of Inam, consisting of grants of several villages in lieu of military or other service.

Resumability, condition of service, etc., are only the characteristics of an Inam but not its essentials. The only thing that is common to all the Inams is that it is a beneficial alienation of the assessment in favour of the subject. For the purposes of Madras Acts V of 1884 and VII of 1865 and the Land Acquisition Act, the Tanjore Palace Estate has been treated as an Inam by the Executive Government. Maclean's Manual, Vol. I, pp. 166-167.

G. S. Ramachandra Aiyar and *A. V. Visvanatha Sastri* for respondent:—The Tanjore Palace Estate has not been granted as an Inam. An 'Inam' implies a grant by a superior to an inferior. In this case the relations between the grantor and grantee were not those of a superior and inferior, but of independent Sovereigns.

[*Chief Justice*:—Surely not, after the confiscation. After the treaty of 1799, the powers of the Rajah were merely nominal.]

Secondly there was no fresh grant in this case.

There was simply a restoration to the old dynasty. *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee* [6]. The act of the Government was not an act of grace, but of repentance. There was no *sanad* to evidence the grant. There is no condition of service annexed to the grant and it is not resumable. The term "granted in Inam" has, as pointed out in S. A. No. 2661 of 1913, a definite and restricted meaning. The Inam was not registered under Regn. 31 of 1802 and the rules framed by the Board of Revenue in 1859. The reasoning in S. A. No. 2661 of 1913 is completely in my favour. See also Standing Orders of the Board of Revenue, Vol. 2, para. 52; Madras Act IV of 1862.

1. (1859) 7 M. I. A. 128, 133.
2. (1912) I. L. R. 36 B. 369, 658, 659.
3. (1916) 30 M. L. J. 600.
4. (1867) 4 Bom. H. C. R. A. C. J. 1.
5. (1902) I. L. R. 26 M. 339.
6. (1867) 12 M. I. A. 1, at 38.

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The Hon'ble The Advocate General was not called upon to reply.

The Court expressed the following

Opinion:—*The Chief Justice*:—The repealed Rent Recovery Act VIII of 1865 contained in Section I a comprehensive definition of "land-holders," and proceeded to regulate the relations of certain classes of land-holders enumerated in S. 3 with their tenants, as those holding under them were called, leaving other land-holders unrestricted. The classes who were made the subject of this special legislation were broadly speaking, with one exception, assignees of land revenue, and ordinary Government ryots paying the full assessment direct to Government were unaffected. In the present Act the line is drawn by the definition of estate in S. 3 (2) which has been adapted from the definition of estate in S. 4 of the Madras Proprietary Estates Village Service Act II of 1894. Clause (*d*) restricts the operation of the Act by including only the inams therein mentioned thereby excluding the so-called minor inams, but the definition as a whole clearly shows the general intention of the legislature to include all large estates held directly under Government, and clause (*e*) extends it to estates consisting of one or more villages not held directly under Government but as a permanent under-tenure. The presumption therefore is that it was the intention of the legislature to apply the provisions of the Act to the numerous villages constituting the Tanjore Palace Estate, though it is of course necessary to show that they come within one or other of the classes of the definition. The villages in question formed part of the territories of the Rajah of Tanjore as to which he agreed by the treaty of 1799 to cede the collection of the revenues and the administration of justice to the East India Company. By some arrangement come to at the time the Company refrained from enforcing its rights under the treaty to the revenue of these villages, and they remained in the enjoyment of the Rajahs until the death of the last Rajah when his territories were taken possession of on behalf of the Crown by an Act of State. It was expressly decided in *The Secretary of State* v. *Kamachee Boye Sahiba* [1] that these villages, forming the so-called private estate of the Rajah, then became the property of Government; and some years later they were granted as a matter of grace and favour to the widows of the late Raja and after them, to

1. (1859) 7 M. I. A. 476.

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his daughter, or failing her his next heirs, as held by this Court in *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba* [1]. It is admitted that the kudivaram right in the suit village, and in almost all the other villages, does not belong to the estate; and these villages are therefore villages of which the land revenue alone has been granted by the British Government to persons not owning the kudivaram right, and they therefore come within clause (d) if they can be said to have been granted "in inam" within the meaning of the section. The definition of the word 'inam' in Wilson's Glossary expressly covers irresumable revenue-free grants or assignments of revenue such as this. The word "Inam" as held by the Privy Council in *Raghojirao Saheb* v. *Lakshmanrao Saheb*, [2] is a term of wide signification, wide enough, as held in *G. Sam* v. *Ramalinga Mudaliar*, [3] to include jaghirs which however are separately mentioned in clause (c) of the definition. The meaning of the term 'jaghir' is discussed in that case, and I agree with the observation of Coutts Trotter, J., that all jaghirs are a species of inams though there are many kinds of inams that are not jaghirs. The terms jaghir and jaghirdar were terms of some dignity, and were used in the grants themselves or by the grantees for that reason. The grant now in question appears to have been commonly spoken of as a mokhasa grant, and though it cannot be said to have been granted on what is understood as mokhasa tenure, the use of the word goes to show that it was regarded as an inam of a dignified character. There was no distinctive word for a peculiar inam of this kind, and it was probably thought better to use the word mokhasa though not strictly applicable rather than to describe the grantees merely as inamdars, a term which includes large numbers of petty grantees in very humble circumstances. There is, in my opinion, no sufficient ground for supposing that it was intended to exclude from the operation of S. 3 (2) (d) grants which were irresumable as the fact that they were irresumable would not be a ground for excluding them having regard to the policy of the Act. I am not satisfied that the Rules for the adjudication and settlement of Inam lands of 1859 have any bearing on this question. Under Rule 4 personal or subsistence grants, such as this, if inquired into, would have simply been confirmed according to

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1. (1868) 3 M. H. C. R. 424, p. 444. 2. (1912) I. L. R. 36 B. 639. (P. C.)
3. (1916) 30 M. L. J. 600.

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their tenor, that is to say as revenue-free and irresumable. However this may be, I do not think these rules afford any ground for putting a restrictive construction on the word inam as used by the legislature in the Act of 1908, especially when the result of so doing would be to exclude from the operation of the Act a large estate which there is no other reason for excluding. I would answer the question in the affirmative.

Sadasiva Aiyar, J.

Sadasiva Aiyar, J:—I take it that, though the question referred to us is as regards the whole of the Tanjore Palace Estate consisting among other things of about 190 villages, our answer is to be confined to the Mokhasa Ullikadai village within whose limits are situated all the subject-matters of the suits out of which these revision petitions have arisen. As regards this village, it seems to have been conceded by the respondents' Vakil before the referring Bench that the land revenue alone belonged to the Tanjore Palace Estate. I concur entirely with my Lord as regards the whole Estate that there was a new grant in 1862 to the Rajah's senior widow by the British Government. That new grant related to the Government Revenue alone (according to the admission above mentioned) so far as the arable lands of the Ullikadai village were concerned.

The next question is whether the grant of the revenue of this village can be called a 'grant in inam' by the British Government and whether the definition of Estate found in clause 2 (d) of S. 3 of the Madras Estates Land Act applies to this village. I concurred with Mr. Justice Napier in his judgment in Second Appeal No. 2661 of 1913 in which he held that in the phrase 'granted in inam,' the word 'inam' should be given a definite and restricted meaning which (according to my said learned brother) that word had acquired in the Madras Presidency since the days of the first Inam Settlement. That restricted and definite meaning (if I understood his judgment aright) was a grant of lands or land revenue made in such a manner that a reversionary right could be claimed by the British Government in the subject of the grant on the occurrence of certain events. As no such reservation was intended in the case of the grant of revenue of any of the villages of the Tanjore Palace Estate, we held in Second Appeal No. 2661 of 1913 that it did not consist of villages whose revenues were granted 'in inam'. The Government never seems to have contemplated the registration of these

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villages as inam villages or to include them in the list of inam villages to be entered in the Registration Records relating to such villages. There seems to have been no intention to instruct the Inam Commissioners or the Inam Settlement Officers to deal with any of these Palace Estate villages by way of confirmation or of modification of the grant of 1862.

No doubt, the word 'inam' means "gift or benefaction" in the widest and most popular sense of that Arabic term which has passed practically into every one of the Vernacular languages of India. It is a gift by a superior to an inferior and is applied in popular language to any gift, *whether of moveables or immoveables* and of however petty a value. But it has also got several restricted meanings, such restricted meanings, varying in different parts of India. Wilson says, "In India, and especially in the south, and amongst the Marathas, the term was specially applied to grants of land held rent-free, and in hereditary and perpetual occupation." Then he says "the tenure came in time to be qualified by the reservation of a portion of the assessable revenue, or by the exaction of all proceeds exceeding the intended value of the original assessment." He says further on that "the term was also vaguely applied to grants of rent-free land without reference to perpetuity or any specified conditions." He likewise mentions very numerous distinctions among the tenures called "Inams" (see also pages 38 to 41 of Mr. Rama Doss' Book on the Estates Land Act).

It is thus clear that when a Madras Statute uses the word 'inam', it does not signify a gift of whatever kind of property by a superior individual of whatever status to an inferior. Some restriction of the above very wide general significance being assumed (the Inam rules found in the Board's Standing Orders, Vol. 2, para. 52, the Proceedings of the Inam Commissioner and Act IV of 1862, all these also evidently implying such a qualification), Mr. Justice Napier's opinion was that the legislature when talking of a grant "in inam" could have had in its contemplation only a grant in the subject of which the Government had retained some reversionary interest to be enforced in certain contingencies. I am free to admit that the knowledge of my learned brother Mr. Justice Napier as regards revenue matters and revenue Regulations and his long official experience of such questions (through official contact with the higher

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Revenue Officers of the Government) being much more extensive than I could profess to claim, I without much hesitation deferred to his opinion on the question. Even after the full arguments which I have heard in this Full Bench Reference, I cannot say that the view which Napier, J., and myself took in Second Appeal No. 2661 of 1913 is wholly unsupportable.

But as my Lord the Chief Justice whose experience and whose knowledge of the history, policy and progress of the legislation which resulted in the passing of the Madras Estates Land Act is, if I may say so with respect, unique, is of opinion that the legislature could not have intended in the definition in clause (d) of Section 3 (2) to exclude villages in the granted revenues of which the Government reserved no reversionary interest, I agree that the opinion contra expressed in the decision in Second Appeal No. 2661 of 1913 should be overruled especially because (as pointed out by Mr. Justice Ayling in his referring judgment) the preponderating balance of convenience is in favour of not restricting unduly the meaning of the phrase "granted in inam".

Seshagiri Aiyar, J.

Seshagiri Aiyar, J:—The further arguments addressed to us have confirmed me in the view I took in the Order of Reference. I entirely agree with the opinions expressed by the learned Chief Justice.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

Kunchithapatham Pillai ... *Appellant 3rd Deft. in O. S. No. 337 of 1912.*

v.

Palamalai Pillai (deceased) ... *Respondents (Plaintiffs).*
and others

Kunchithapatham Pillai v. Palamalai Pillai.

Transfer of Property Act, S. 82—Contribution—"Contract to the contrary," meaning of—Mortgage—Sale of portions of hypotheca to several persons with direction to pay off specific portions of the mortgage debt—Default—Liability of purchasers inter se*—Contract Act Ss. 69 and 70—" Bound by law ", meaning of.*

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* S. A. Nos. 1,659 and 2,597 of 1914. 29th August 1916.

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The liability to rateable contribution of properties mortgaged in the first instance and sold subsequently in lots to different persons is imposed by S. 82 of the Transfer of Property Act subject to the limitations therein laid down. The "contract to the contrary" contemplated by Cl. 2 of S. 82 is one between the subsequent purchasers of the mortgaged property *inter se* and not between the mortgagor and a purchaser of a portion of the property mortgaged.

Though a vendor does not lose his lien for unpaid purchase money by directing the vendee to pay off his debts, still the lien resides in the vendor himself and does not pass to third persons without a conveyance.

Ss. 69 and 70 of the Contract Act do not apply to claims for contribution arising under the circumstances mentioned in S. 82 of the Transfer of Property Act. The expression "bound by law to pay" in S. 69 means a legal and not a contractual liability.

A. hypothecated his properties to B. in 1895 and in September 1897 sold a portion of them to C. directing him to pay B. a sum of Rs. 1,200 towards the mortgage-debt. In 1897 A. sold some other items of the hypotheca to D. with a similar direction to pay Rs. 460. Finally A. sold the rest of the hypotheca to E. who agreed to pay Rs. 2,000 towards the mortgage-debt due to B. Default having been made in the payment of the aforesaid sums, B brought a suit for sale against A. C. D. and E. and obtained a decree for sale. C. and D. paid the mortgagee decree-holder such portions of the debt as would, but for the undertaking, have been proportionately chargeable on the properties purchased by them, but less than the amount undertaken to be paid. E. who was the purchaser of the bulk of the properties had to pay considerably more than Rs. 2,000. In a suit by E. claiming contribution from C. and D., *Held* that the claim was unsustainable under S. 82 of the Transfer of Property Act and also that Ss. 69 and 70 of the Contract Act had no application to the case.

Second Appeals against the decrees of the Dt. Court of South Arcot in A. S. Nos. 99 and 100 of 1913, preferred against the decrees of the Court of the Dt. Munsif of Mannargudi in O. S. Nos. 337 and 336 of 1912 respectively.

T. R. Ramachandra Aiyar, *T. R. Krishnaswami Aiyar* and *T. Muthiah Pillai* for Appellant.

T. R. Venkatarama Sastri for Respondents.

The Court delivered the following

Judgment:—The owner of the properties was one Murugappa Pillai. He mortgaged them to one Krishnachariar in 1895. In September 1897, he sold some of the properties comprised in the mortgage to one Kunjithapatham with a direction to pay Krishnachariar, the mortgagee, Rs. 1,200. A portion of this amount was paid, but a good portion remained unpaid. In October, some other properties also included in the mortgage, were sold to one Duraisami, with a direction to pay Rs. 460 and odd to the mortgagee, the deed also containing a covenant to clear off prior mortgages. This was not paid. The remaining properties comprised in the mortgage were sold to Rajagopal and

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others and they were asked to pay the mortgagee Rs. 2,000 and odd. This sale deed is not before us on appeal, but it is admitted that there is no assignment or specific covenant in favour of the purchaser on which he can rely for the purpose of this suit. The mortgagee sued Murugappa Pillai and the three alienees among others on the mortgage. Kunjithapatham and Duraisami entered into a compromise with the plaintiff regarding the amounts payable by them. Rajagopal (we shall call the third party by this name, although there are others who have equal interest with him) was no party to this compromise. The decree in the suit was for Rs. 3,000 and odd, and it directed that out of the said amount Duraisami should pay Rs. 500, Kunjithapatham Rs. 1,000, that in default their properties should be sold for the amounts specified, and that for the balance the other properties which were in the possession of Rajagopal and others should be sold. Rajagopal had to pay a considerable sum, as he was the largest purchaser. This suit is by his heirs for contribution. It was found by the District Munsif and not disputed before us, that both Duraisami and Kunjithapatham paid under the decree the portion of the debt which would have been chargeable on the properties purchased by them, if there were no directions to them to pay particular sums. The plaintiff's base their suit on the allegation that as both Duraisami and Kunjithapatham undertook to discharge a specific portion of the mortgage debt, and as their failure to pay the amount within the time mentioned by the mortgagor increased the amount due to the mortgagee, their liability should not be calculated upon the value of the properties purchased by them, but upon the quantum of the liability undertaken by them at the direction of the mortgagor. The District Munsif dismissed the suit. On appeal, the District Judge relying on Ss. 69 and 70 of the Indian Contract Act decreed the claim. Duraisami and Kunjithapatham preferred separate appeals to this Court.

The question has been agreed with great ability before us, and the arguments covered a very wide ground of the law of mortgages. We think the solution has to be found in the Transfer of Property Act and not in the English cases quoted at the bar.

The liability to rateable contribution of properties mortgaged in the first instance and sold subsequently in lots to different persons is imposed by the Transfer of Property Act. The legislation may have been based on equitable grounds; but its limits are

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prescribed by the statute. In the second clause of Sec. 82, the liability is defined in a particular way, "in the absence of a contract to the contrary." Now, "this contract to the contrary" can only be between the parties who are liable to contribute. That is the plain meaning of the section. See also the observations in *Ramabhadrachar* v. *Srinivasa Aiyangar* [1]. Mr. Venkatarama Sastriar in his very able argument referred us to certain English decisions to the effect that a contract as between the mortgagor and the purchaser of a portion of the property is within the meaning of the expression "contract to the contrary." We are unable to accept this contention. We shall have a word to say about the English authorities later on; but before doing so, we shall deal with the sections of the Act.

Under Sec. 55, Cl. 4 (b), the vendor has a lien for the unpaid mortgage money over the properties sold. This lien, it was held in a recent Full Bench ruling of this Court *Subramania Iyer* v. *Sivasubramania Iyer* [2] is not lost by the direction given by the vendor to pay the mortgagee or any other third party. This right can be transferred, if the vendor executes a proper conveyance in this behalf. But until such a transfer is made, the right inheres in the vendor and in him alone. A subsequent purchaser from him cannot acquire this right by the mere fact of his purchase. The Transfer of Property Act has prescribed the mode by which such transfers can be effected and in our opinion, there is no room for the applicability of equitable considerations when the legislature has enacted specific rules.

Mr. Venkatarama Sastriar's contention, if accepted, must lead us to hold that when the vendor sells a portion of the property with direction to pay a portion of the mortgage debt, the mortgage debt to that extent is extinguished. This would violate the principle that it is open to the mortgagee to sell any portion of the mortgaged property to recover the amount due to him. The learned Vakil argued that when the owner directed the purchaser to pay a certain amount, he impliedly transferred his right of lien to the second purchaser. There are some decisions which lend support to this contention. In *Bute (Marquis of)* v. *Cunynghame* [3], Lord Eldon said: "But may not a man make a mortgage of two estates in such a way, that though the incumbrancer may go against both or either, yet if the owner of the equity of redemption shall have

1. (1901) I.L.R. 24 M. 85. 2. (1916) I. L. R. 39 M. 997=31 M.L.J. 580.
3. (1826) 2 Russ. 275 at 299 : 38 E. R. 339, 348.

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created in the meantime, two different titles to those estates, so that they shall go to different persons, the estate, which was the primary security, shall remain the primary security, as between the persons claiming under that mortgagor" This is the passage very strongly relied on; but towards the close of the judgment, the Lord Chancellor said: "Taking the whole of this transaction together, and without venturing to lay down any general principle, it is my opinion, that, in this case, there is no right to that contribution towards satisfaction of the mortgage, which is prayed by the bill." This was a case of voluntary settlement, and the question was whether persons claiming under the settlement were not bound by the directions of the settlor. No question of legal rights to contribution arose in the case. That this case enunciated no general principle is pointed out by Jessel, M. R. in *Leonino* v. *Leonino* [1]. Chitty, J. in *In re Dunlop*; *Dunlop* v. *Dunlop*[2] stated: "The proposition has been stated (and I think not incorrectly) that the right of contribution arises where there are two properties available in equity for the debt, of course in equal degree. It is quite clear that either by special agreement to be found in the instrument creating the mortgage itself, or by declaration on the part of the testator, he can, where two or more properties are comprised in the same security, direct the order in which the securities are to be applied *inter se* so as to make one the first and another the second, and so forth, available for the purposes of the charge." There can be no doubt that the special agreement referred to by the learned Judge is one which binds the mortgagee and is embodied in the deed of mortgage. The reference to the declaration of the testator indicates that a volunteer must accept the gift with obligations annexed to it. We do not think these cases support the proposition that by the mere fact of the subsequent purchase, the purchaser gets an implied transfer of the undertaking given to the vendor by the 1st purchaser. On the other hand, in Fisher on Mortgages, paragraph 1347, the law is stated as we find it in the Transfer of Property Act.

Turning to the Indian Cases relied on in the argument, *Mothuranath Chuttopadhya* v. *Kristokumar Ghose* [3] is against the position contended for by the respondent. That case was before the Transfer of Property Act. Dr. Rash Behary Ghose doubts the

1. (1879) 10 Ch. D. 460. 2. (1882) 21 Ch. D. 583 at 588.
3. (1878) I.L. R. 4 C. 869.

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correctness of the decision, presumably on the dictum of Lord Eldon in *Bute (Marquis of)* v. *Cunynghame* [1]. The decision in *Muhammad Abbas* v. *Muhammad Hamid* [2] is under the Transfer of Property Act. The learned Judges, correctly (if we may say so, with respect) lay down that the contract between the vendor and one of the purchasers would not amount to a contract to the contrary under S. 82; but they proceed to say, "If the defendants are entitled to resist the claim for rateable contribution it must be on equitable grounds or because the benefit of the agreement has been assigned to them." We agree that if the benefit of the agreement was expressly assigned in a form which the law requires, a valid defence may be raised. But we are unable to accede to the introduction of equitable grounds on a question settled by the legislature. If there is no contract to the contrary, the provisions of the law must be given effect to.

So far we have been dealing with a question on which there is no authority in the decisions of this Court. Mr. Venkatarama Sastriar's second contention involves an examination of two decisions of this Court. The contention is that notwithstanding S. 82 of the Transfer of Property Act, the liability has to be ascertained with reference to Ss. 69 and 70 of the Indian Contract Act. Very recently, the Chief Justice and Srinivasa Aiyangar, J., held that these sections of the Contract Act do not affect the claim for contribution under S. 82 of the Transfer of Property Act, *Sree Rajah Simhadri Jagapatiraju* v. *Sree Rajah Dakshina Kavata Dugaraju* [3]. We agree with that conclusion. In *Muthurakku Maniagaran* v. *Rakkappa* [4] Mr. Justice Sadasiva Aiyar rested the claim for contribution on Ss. 69 and 70 of the Contract Act. Mr. Justice Miller who took part in the decision based his conclusions on other grounds. It may be pointed out that no argument seems to have been addressed to Mr. Justice Sadasiva Aiyar on S. 82 of the Transfer of Property Act. Further, in the case before the learned Judge, apart from the Transfer of Property Act, there was some ground for saying that one man paid what the other was bound to pay. To our mind, the obvious inapplicability of the Contract Act sections arises from the consideration that the plaintiff in this case cannot be said to have paid anything which the other was "*bound by law to pay*". What is intended is a contractual

1. (1826) 2 Russel. 275 at 299.
2. (1911) 9 A.L.J. 499.
3. (1915) 29 M. L. J. 689.
4. (1914) 26 M. L. J. 66.

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obligation and not a legal one. It is argued that a person is bound by law to pay his contracted debts; and in one sense this is true; but we are inclined to think that that it is not what was intended by the section. The illustration seems to indicate the class of liability covered by the section; and it has been very recently held by the Privy Council in *Mahomed Syedol Ariffin Bin* v. *Yeoh Ooi Gark* [1] in an appeal from the decision of the Supreme Court of the Straits Settlements in construing S. 32, cl. 5 of the Evidence Act that the illustrations to a section are a guide to the intent of the legislature. It is on this ground that the decisions of this court which refused relief to a man in whose name pattah stands and who has been compelled to pay the revenue which the person in enjoyment ought to have paid, rest. See *Boja Sellappa Reddy* v. *Vridhachala Reddy* [2]. One other distinction between the present case and that decided by Sadasiva Aiyar, J., may be pointed out. In the latter there was a personal liability under the decree. We therefore see no reason for resorting to Ss. 69 and 70 of the Contract Act. Even if the application of S. 69 is not limited as we suggest, it could not, in our view, assist the respondent, because all the assignors of the mortgaged property are equally bound to pay the mortgage debt and we cannot agree with the contention that any equities between co-obligors would make any one of them the less "bound by law to pay" the mortgagee.

Mr. Ramachandra Aiyar rested his case, also on the decision in *Satya Kripal Bandopadhya* v. *Gopi Kishore Mandul* [3], and contended that whatever may have been the rights under the purchase the decree worked a merger of those rights: and that parties claiming rights under that decree are not bound by previous obligations. In the case relied on, the auction purchaser was held disentitled to fall back on rights which existed before the decree. We do not think the position of the plaintiffs is analogous to that of an auction purchaser.

In the view we take, and on the finding of the District Munsif not impeached in this Court that the appellants paid the amount proportionate to the value of the properties in their possession, the appeals must be allowed and the suits as against them must be dismissed with costs in all the Courts.

A. V. V.

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1. (1916) L. R. 43 I. A. 256=20 C. W. N. 786.
2. (1906) I. L. R. 30 M. 55.=16 M. L. J. 569.
3. (1902) 6 C. W. N. 583.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Seshagiri Aiyar.

Nataraja Naicken ... *Appellant** (*2nd Defendant*).

v.

Ayyasawmi Pillai and another ... *Respondents* (*Plaintiff and 1st Deft.*)

Nataraja Naicken v. Ayyasawmi Pillai.

Promissory Note—Execution by one member of a joint Hindu family—Indorsement—Liability of other members of the family to the indorsee.

An indorsee of a promissory note executed by a member of a joint Hindu family can sue the maker as well as the other members of the family and obtain a decree against the latter to the extent of the joint family property in their hands, on proof that the debt for which the promissory note was executed was binding on the family.

T. Seetharama Chetty v. *P. Seshiah Chetty* [1] dissented from. *Krishna Iyer* v. *Krishnaswami Iyer* [2] followed.

Appeal under clause 15 of the Letters Patent against the decision of the Hon'ble Mr. Justice Coutts-Trotter dated the 27th day of January 1916 in C. R. P. No. 74 of 1915 preferred against the decree of the Court of the Subordinate Judge of Mayavaram in S. C. S. No. 1374 of 1914.

T. V. Gopalaswami Mudaliar for Appellant.

T. R. Venkatarama Sastri for Respondents.

The Court delivered the following

Judgment:—The 1st defendant, the younger brother of the 2nd defendant with 3 other persons executed a pro-note to a third person. The major portion of the debt was borrowed by the 1st defendant. This borrowing is found by the court of First Instance, and by Mr. Justice Coutts Trotter, to have been made on behalf of and for the benefit of the joint family of the two defendants. We accept this conclusion. On this pro-note, the four executants were sued: after decree the 1st defendant arranged with the plaintiff's assignor that the decree should be satisfied by the latter; and as consideration therefor, executed Ex. A the plaint note. The note was endorsed to one Vaithianatha Aiyar who in turn endorsed it over to the plaintiff. Plaintiff seeks to make the 2nd defendant liable on the ground that the debt was borrowed for family purposes. A number of contentions were raised before us by Mr. Gopalaswami Mudaliar: we shall deal with the minor ones first. There is no authority

* L. P. A. No. 91 of 1916. 30th November 1916.

1. (1912) M. W. N. 1011. 2. (1900) I. L. R. 23 M. 597.

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for the proposition that the promisee should not only lend for the benefit of the family, but that he should also see that the loan was applied for purposes binding on the family. On the other hand *Raghunathji Tarachand* v. *The Bank of Bombay* [1] is against that contention.

The burden of proof under S. 50 of the Negotiable Instruments Act, is on the promisor to show that a reservation of rights on a transfer was made by express words. It was apparently not argued in the first Court, that the endorsement in this case restricts the endorsee to enforcing his rights only against the person of the maker of the note. And certainly no issue was taken on the question. On reading the endorsement, we are satisfied that it was not in the contemplation of the parties to the endorsement, that the endorsee should not have all the rights of the endorser.

The main question relates to the rights of the endorsee. It was contended by the learned Vakil for the appellant, that although under S. 130 of the Transfer of Property Act, an assignment might convey to the assignee all the rights which the assignor had, an endorsement would confer only the right of suing the promisor personally: we are unable to accept this contention. It is true that this proposition receives support from the judgment in *Seetharama Chetty* v. *Seshiah Chetty*. [2] But we agree with Mr. Justice Coutts Trotter, that this decision is opposed to the previous decisions of this Court, and is not justifiable on principle. The judgment does not give any reasons for the conclusion come to, and we are not prepared to follow it.

S. 50 of the Negotiable Instruments Act says that property in the note passes by endorsement. This can only mean that the endorsee stands in the shoes of the endorser, unless apt language is used to reserve to himself any specified rights.

As pointed out by Mr. Venkatarama Sastriar, Vakil for the respondent, the general rule is, that a transfer, whether it be by way of assignment, passes all the interest which the transferor is capable of passing in the property, (Sec. 8 of the Transfer of Property Act) and we see no reason for not applying that principle to Negotiable Instruments.

It was contended that the liability of the Hindu family is not on the note, but on the debt. True; the transaction is one and the same whether the plaintiff is restricted in enforcing it to

1. (1910) I. L. R. 34 B. 72. 2. (1912) M. W. N. 1011.

Nataraja Naicken v. Ayyasawmi Pillai.

seeking his remedy against the person of the maker, or whether his right is enlarged by reason of the fact that the maker is a member of a joint Hindu family and borrowed the debt for the benefit of the family. The contrary view would lead to extraordinary results. There may be one suit on the note against the maker personally and another against the family members on the Hindu Law liability. We see no reason for adopting a view which would lead to such an anomaly.

It was pointed out by Shephard, J. in *Krishna Aiyar* v. *Krishnaswami Aiyar* [1] that even under the English Law a promissory-note by a married woman would subject the husband to liability. The Married Woman's Property Act only restricted the liability to the assets. Similarly, under the Hindu Law, the liability of the other members is limited to the joint family property. We think *Krishna Aiyar* v. *Krishnaswami Aiyar* [1] is decisive on the question argued before us. The same view was taken in *Ragunathji Tarachand* v. *The Bank of Bombay* [2] and in *Krishnamurthi* v. *The Bank of Burma* [3]. In the two latter cases, on a suit by the endorsee, it was held, that the coparceners were liable. Certain observations of Mr. Justice Srinivasa Aiyangar in *Shanmuganatha Chettiar* v. *Srinivasa Aiyar* [4] were relied on. The observations were purely *obiter*, and the learned Judge himself expresses no definite opinion on the question. As regards *Thaith Othathil Kutti Amma* v. *Purushotham Doss Raggi Seth* [5] it is enough to point out that the Judicial Committee have held in *Karmali Abdulla* v. *Karinji Jivanji* [6], that on a note by one of the partners, the others would be liable in so far as the operation was natural to the partnership and for the partnership. The same observation would *mutatis mutandis* apply to the present case. Having regard to this pronouncement of the Judicial Committee *Thaith Othathil Kutti Amma* v. *Purushotham Doss Raggi Seth* [5] can no longer be regarded as good law. In *Somasundaram* v. *Krishnamurthi* [7], no question of the money having been used for partnership purposes was raised or decided.

We are of opinion that Mr. Justice Coutts Trotter is right in holding that the 2nd defendant is liable on the note executed by his younger brother. The appeal fails and is dismissed with costs.

A. V. V.

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1. (1900) I. L. R. 23 M. 597.
2. (1910) I. L. R. 34 B. 72.
3. (1911) 21 M. L. J. 620.
4. (1916) 31 M. L. J. 188 at 145, 146.
5. (1911) 21 M. L. J. 526.
6. (1915) I. L. R. 39 B. 261=28 M. L. J. 515.
7. (1907) 17 M. L. J. 126.

PRIVY COUNCIL.

Present:—Lord Parker of Waddington, Lord Sumner, Sir John Edge and Sir Lawrence Jenkins.

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Tricomdas Cooverji Bheja ... *Defendant* Appellant.*

v.

Sri Sri Gopinath Jiu Thakur ... *Plaintiff Respondent.*

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Tricomdas Cooverji *v.* Gopinath Jiu.

Limitation—Suits for rent based on a registered contract—Whether Art. 110 or Art. 116 of the second Schedule to the Limitation Act applies—Mining royalties—Are they "rent" under the Limitation Act—Indian Limitation Act, (Act 9 of 1908) Schedule 2, Arts. 110, 116—Error in decree—May be corrected by Appellate Court as against a party appealing in favour of a party who has not appealed.

Suits for rent based on a registered contract are governed by Art. 116 and not by Art. 110 of the Indian Limitation Act, 1908, Schedule 2.

Lalchand v. *Narayan* [1], affirmed.

Ram Narain v. *Kamta Singh* [2], disapproved.

The trial Court made a decree against the first defendant partly in favour of the plaintiffs and partly in favour of the second defendant. First defendant alone appealed. The Appellate Court corrected the second part of the decree by awarding to the plaintiffs for the second defendant's benefit the amount awarded to him directly by the first Court.

First defendant in this appeal contended that the High Court had no jurisdiction to do this.

Held, that as the first defendant had brought the decree before the High Court for review, they had power to make the decree they did.

Appeal from a decree of the Calcutta High Court (Chitty and Teunon, JJ.) dated May 29, 1912, modifying a decree of the Additional Subordinate Judge of Burdwan.

The Shebaits of an idol by a registered lease demised certain mining rights to appellant's father on the terms, among others that he should pay certain commission or royalties on all coal etc., raised by him, and that if no coal were cut he should pay a minimum royalty of Rs. 4,000 per annum. There were four Shebaits: three of them in 1908 sued appellant for royalties due from 1901 onwards. They joined the other Shebait as 2nd defendant on the ground that he had refused to join as plaintiff.

The first defendant pleaded payment. The second defendant pleaded that he had received Rs. 4,000 from first defendant and that he was entitled to get a joint decree with the plaintiffs for his one-fourth share deducting this Rs. 4,000.

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* 20th December, 1916.

1. (1913) I. L. R. 37 B. 656. 2. (1903) I. L. R. 26 A. 138.

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The Subordinate Judge held on the evidence that the payment alleged by the first defendant was not made out. He decreed the suit and awarded defendant No. 2 the amount claimed by him.

Defendant No. 1 (the present appellant) appealed to the High Court. Defendant No. 2 did not appeal. The High Court modified the decree by awarding to the plaintiffs for the benefit of defendant No. 2 the sum which the Subordinate Judge had awarded him direct. The contest before the High Court was mainly as to the fact of payment: Limitation was not raised in the grounds of appeal, and was "not very strongly pressed" before the High Court, who held that they were concluded by authority and dismissed the appeal.

Defendant No. 1 appealed to the Privy Council, where his "case" contained the following "reasons" referring to limitation.

(1) A large portion of the said claim was barred by limitation.

(4) The decree made by the Lower Court in favour of the plaintiffs......ought to have been reduced by the amount of the claim barred by limitation.

DeGruyther K. C., and Dunne for Appellant.—Except for 3 years before the suit the claim is barred. The suit is to recover rent, and the Article applicable is 110. The High Court were wrong in thinking Art. 116 applied: they relied on *Umesh Chandra Mandal* v. *Adamani Dasi.*[1]

That case has been dissented from in *Ram Narain* v. *Kamta Singh.*[2]

[*Lord Parker*:—Is the claim here for rent at all ?]

I submit it is. For a definition of rent, vide Encyclopaedia of English Law: "Royalties" are defined in *Attorney Gen. of Ontario* v. *Mercer*[3].

Given an appropriate Article which applies, you must apply it and not go to a general Article. Rent has a separate and distinct Article to itself. Art. 116 is for compensation for breach of contract. Rent is not such compensation. "Compensation" is not defined in the Limitation Act, and it is only by reading Sec. 73 of the Indian Contract Act into it that Art. 116 can be made to cover the case. The real clue to Art. 116 is Art. 115. Art. 110 is outside both Art. 115 and Art. 116.

1. (1887) I. L. R. 15 C. 221
2. (1903) I. L. R. 26 A. 138.
3. (1883) L. R. 8 A. C. 767, 777.

Our second point is that Defendant No. 2 could not recover without being made a plaintiff. The Sub-Judge gave him a decree against another defendant. The High Court recognised that this was wrong, but in substitution gave the plaintiffs a decree for the whole amount. This they could not do. The plaintiffs accepted their decree for ¾ths and the High Court had no power to give them more when there was no appeal before it as to the ¼th.

Sir W. Garth for respondents :—The Limitation Act does not in terms deal with an action for royalties. Such royalties may or may not be rent. The plea of limitation was not taken before the trial Court nor was any issue raised or decision given. The High Court were wrong in considering the point at all. S. 3 of the Limitation Act applies only to cases clear on the face of the plaint. If the defendant had taken the plea that the action was barred because the royalties were rent evidence could have been taken as to whether they were rent or not. The case was really fought on the question of payment, and the appellant cannot now raise the plea of limitation.

[The Board intimated that they did not wish to hear further argument on the question of limitation.]

There is no force in the other point. The plaintiffs originally claimed the whole amount. The decree was under the circumstances quite proper.

Their Lordships' Judgment was delivered by

Lord Sumner.

Lord Sumner:—In this case an idol, by his Paricharaks and Shebaits, sued to recover mining royalties under a lease of his colliery property in Burdwan. The Shebaits, who made the agreement in suit, were four brothers, and the property was the Ijmali debuttar property of their family deity. Owing to some quarrel the collection of rents was not always joint and, at the time when the principal defendant was making default in paying the royalties, one of the brothers obtained from him payment of 4,000 rupees on account of his share, on the terms that, if his co-sharers did not agree to give up their claim to interest and be content with like sums, he was to be paid by the principal defendant in the same proportion as the co-sharers might be paid. This brother was accordingly unwilling to join as a plaintiff in bringing the suit and so was joined as a second defendant. As such he appended to his defence a claim against the first defendant to

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recover *pari passu* with the plaintiffs, after giving credit for the 4,000 rupees already paid, in case they should make out their claim. This was, of course, quite irregular in point of pleading, and gives rise to a technical question of minor importance. The suit was begun more than three and less than six years after the cause of action accrued, and the main question is whether or not the whole claim is Statute-barred.

The lease was effected by a mokurari kabuliyat and a pottah expressed in similar terms. The first defendant agreed that if he failed to cut any coal at all, he would pay a minimum royalty of 4,000 rupees per annum. It is certain that he cut no coal: whether or not he even entered or took possession is not so clear. The sum to be paid per maund of coal gotten is called "commission" and not "rent," but the right acquired by the principal defendant is described as a "settlement." The kabuliyat runs—

"On a proposal being made to take a settlement of the rights of your family "deity in this mouzah for the purpose of raising coal from below the surface of "the said mouzah by making pits, you, for the benefit of your family god, and "with the object of increasing the income of the debuttar property, are making a "settlement with me of the right and interest in the said mouzah to the extent "owned by your family deity."

Their Lordships accordingly take it, as seems to have been done by the Courts below, that the minimum royalty sued for would be "rent" within article 110 of Act XV of 1877, which is the enactment applicable.

The kabuliyat sued on was a registered instrument and the question is whether the suit is one for arrears of rent, as the appellant lessee says, and so is barred by article 110, or whether, as the respondent lessors contend, it falls within article 116 as a suit for "compensation for breach of contract in writing registered," and thus was brought within time. The argument for the appellant is that the suit being for arrears of "rent" is in terms within article 110 and is not, truly speaking, a suit for compensation for breach of contract at all, since the lessee does not covenant to get coal but is at liberty, on paying the agreed minimum royalty, to let the coal alone, and commits no breach of contract if he chooses to do so.

The Limitation Act No. XIV of 1859 provided that the period of limitation applicable "to all suits for the rents of any buildings or lands" should be three years (S. 8); the period applicable to suits brought "for the breach of any contract" three

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years, unless in the case of a contract which could have been registered such registration had taken place within six months from the date of the contract (S. 10); and, thirdly, that the period applicable "to all suits for which no other limitation is herein expressly provided" should be six years. Act IX of 1871 repeals the Act of 1859, and adopts the present framework of a schedule subdivided into articles and columns. Schedule 2, Part VI, the part which comprises the cases to which the period applicable is three years, includes article 110 "for arrears of rent" and article 115 "for the breach of any contract, express or implied, not in writing registered and not herein specially provided for." Part VII, which included the cases to which the period applicable was to be six years, contained article 117—"on a promise or contract in writing registered." This Act in turn was repealed by Act XV of 1877, which re-enacted article 110 in the same terms, and article 115 almost in the same terms, *viz.*, "for compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for," and in Part VII substituted article 116 for article 117, thus, "for compensation for the breach of a contract in writing registered."

Both these Acts draw, as the Act of 1859 had drawn, a broad distinction between unregistered and registered instruments much to the advantage of the latter. The question eventually arose whether a suit for rent on a registered contract in writing came under the longer or the shorter period. On the one hand it has been contended that the provision as to rent is plain and unambiguous, and ought to be applied, and that in any case "compensation for the breach of a contract" points rather to a claim for unliquidated damages than to a claim for payment of a sum certain. On the other it has been pointed out that "compensation" is used in the Indian Contract Act in a very wide sense, and that the omission from article 116 of the words, which occur in article 115, "and not herein specially provided for," is critical. Article 116 is such a special provision, and is not limited, and therefore, specially in view of the distinction long established by these Acts in favour of registered instruments, it must prevail. There is a series of Indian decisions on the point, several of them in suits for rent, though most of them are in suits on bonds. They begin in 1880, and are to be found in all the Indian High Courts. In spite of

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some doubts once only was it held, in *Ram Narain* v. *Kamta Singh* [1], that in such a suit article 110 and not article 116 applied. Then in 1908, and in this state of the decisions, Act IX of 1908 replaced the Limitation Act of 1877 without altering the language or arrangement of the articles, and in 1913, in *Lalchand* v. *Narayan* [2], the High Court of Bombay held that, especially in view of this re-enactment, the current of decisions must be followed and *Ram Narain's Case* [1], must be disapproved. In the present case the High Court treated the matter as settled law in the same sense.

Where the terms of a Statute or ordinance are clear their Lordships have decided that even a long and uniform course of judicial interpretation of it may be overruled, if it is contrary to the meaning of the enactment. *Pate* v. *Pate* [3]. Such is not the case here. However arguable the construction of Act XV of 1877 may have been when the matter was one of first impression, it certainly cannot be said that the construction, for which the appellants argue, was ever clearly right. On the contrary, their Lordships accept the interpretation so often and so long put upon the Statute by the Courts in India, and think that the decisions cannot now be disturbed.

The question of limitation was not discussed at the trial. The principal defendant pleaded payment, made it his main case, failed in it, and now acquiesces in his failure. The decree passed was for royalties up to a certain amount, and was in favour of the plaintiffs for three-fourths and of the second defendant for one-fourth, less credit for the sum admittedly received by him on account. In form this decree was erroneous, and this was admitted in the High Court. The point was doubtless not brought to the attention of the trial judge; otherwise the proceedings could readily have been put in proper form, all the more because the second defendant, though concluding his defence with a claim for a decree against his co-defendant, had previously pleaded that he was entitled to part of the entire arrears of royalties, the subject of the plaintiffs' claim, and had prayed "that this suit may be ordered to be prosecuted upon making this defendant a plaintiff." The High Court corrected the admitted error by making a decree for the entire amount in favour of the plaintiffs, and declaring

1. (1903) I. L. R. 26 A. 138. 2 (1913) I. L. R. 37 B. 656.
3 (1915) L. R. A. C. 1,100.

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that, as to a named part, it was for their share and as to the residue it was for the second defendant's share. The principal defendant by his appeal had brought the entire decree before the High Court, disputing it *in toto.* It was one decree, not two. The second defendant had not appealed. The now appellant argues that, for want of a separate appeal by the second defendant, the High Court had no jurisdiction to award to the plaintiffs for his benefit the sum which had been awarded to him directly by the trial judge. It was said that, as the second defendant, by not appealing, stood by the decree as made below, and as in that form it was wrong, he must lose his right altogether. It would be unjust if this were so. Nevertheless, if the appellant could have shown any provision of the Civil Procedure Code, or of any other enactment, which showed clearly that the High Court had no such power, the objection must have prevailed. No such provision was cited. The appellant himself had brought the entire decree of the trial judge before the High Court for review, and thus they were right in making the decree, which should have been made below, even though the second defendant had given no notice of appeal.

A point was also made that as to the royalty for one kist the claim was in any case statute-barred and that the amount of the decree should be reduced accordingly. Their Lordships think that this point is not open to the appellant. There is no trace of its having been raised before either court below. It does not appear in either the notice of appeal to the High Court or in the grounds for applying for leave to appeal to their Lordships' Board. If it is raised at all by the appellant, in the reasons appended to his case, it is raised only obscurely. It depends on the construction of the kabuliyat in a respect not submitted to either court below, and their Lordships decline to entertain it.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor for Appellant:—*Watkins and Hunter.*

Solicitor for Respondent:—*Theodore Bell & Co.*

A. P. P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

Appan Patrachariar ... *Appellant* (Plaintiff).*

v.

V. S. Srinivasachariar and others ... *Respondents (Defendants 1 to 5).*

Appan Patrachariar v. Srinivasachariar.

Hindu Law—Joint Family—Father—Power to make a gift of ancestral property in favour of female members of the family—Family settlement—Will—Consent of adult sons—Minors, if bound—Mother not legal guardian of infant, when father is alive.

In a joint Hindu family it is competent to the father with the consent of his adult sons and with the consent of relations who are interested in his minor sons, to make fair and reasonable provisions by will in favour of the female members of his family.

Brijraj Singh v. *Sheodan Singh* [1], *Kudutamma* v. *Narasimhacharyalu* [2], *Anivillah Sundararamaya* v. *Cherla Seethamma* [3], *Arunachala Pillai* v. *Sampusnathachi* [4], Relied upon.

The mother is not the legal guardian of a Hindu infant so long as the father is alive.

Second appeal against the decree of the Temporary Subordinate Judge of Trichinopoly in A. S. Nos. 266 and 320 of 1914 preferred against the decree of the Court of the District Munsif of Trichinopoly in O. S. No. 49 of 1914 (O. S. No. 207 of 1912 on the file of the Court of the Principal District Munsif of Trichinopoly).

G. S. Ramachandra Aiyar for Appellant.

T. R. Venkatarama Sastriar for Respondents.

The Court delivered the following

Sadasiva Aiyar, J.

Judgments:—*Sadasiva Aiyar, J.* The plaintiff is the appellant. He purchased the plaint lands in December 1909 from the 1st defendant. The first defendant has a minor step-brother who is the second defendant and also an uterine sister, the 3rd defendant. The first and third defendants' mother was the pre-deceased first wife of one Srinivasa Chariar who died on the 14th November 1908. Within a fortnight before his death and on the 1st November 1908 (when he was in his death-bed and with the knowledge that his dissolution was not far off) he executed the

* S. A. No. 1379 of 1915. 6th February 1917.

1. (1913) I. L. R. 35 A. 337, 346.
2. (1907) 17 M.L.J. 528.
3. (1911) 21 M. L. J. 695.
4. (1907) 27 M.L.J. 485.

will Ex. V (*a*) by which he gave the properties mentioned in the schedule A attached to the will to his eldest son, the 1st defendant, gave the properties mentioned in the schedule B to his minor son, the second defendant, and the land mentioned in the C schedule to his daughter, the 3rd defendant, besides making some other provisions. It is not denied that relatively to the A and the B schedule properties bequeathed to the two sons, the C schedule property left to the daughter is one of small value and it would not be an unreasonably large gift to be made by a very well-to-do father to his only daughter, though he has two undivided sons. It is further found that the 1st defendant, the elder of the two sons who was a major at the time of the will consented to this provision being made in favour of his sister and attested the will and the 2nd defendant's mother, the testator's second wife also consented.

Within a year of the testator's death, however, the widow acting as the guardian of the minor son (the second defendant) repudiated in one respect the validity of the very fair testamentary arrangements made by her husband while willing that the A schedule properties which were given to her step son, the first defendant, for his share by her husband should be his and that the B schedule properties given to her son the second defendant should belong to the said son absolutely, grudged the gifts of the C schedule properties to her step-daughter, the 3rd defendant. Thereupon on the 3rd November 1909, the 1st defendant and the step-mother acting as guardian of the 2nd defendant, executed the agreement Ex. K by which the C schedule properties were arranged to be sold and converted to cash and the sale proceeds divided equally between the two sons. It was in pursuance of this agreement that the 1st defendant sold the properties to the plaintiff in December 1909 under Ex. A.

The lower Appellate Court held that though the properties dealt with under the will Ex. V (*a*) were ancestral properties in which the two sons of the testator owned interests by birth, a reasonable gift could be made by the father in favour of his only daughter so as to bind his sons and that such a gift even though made by will would be binding on the sons if they consented to it. It also held that the first defendant having consented to the dispositions in the will was bound thereby and that the 2nd defendant though a minor at the time was also bound as

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Sadasiva Aiyar, J.

consent could be given on his behalf by his mother in his interests and such consent was given. On these findings it held that the 3rd defendant became the sole owner of the C schedule properties, that is the plaint lands by the testamentary gift and that the plaintiff purchased nothing but a bag of wind under the sale deed Ex. A. The Lower Appellate Court accordingly dismissed the plaintiff's suit with costs of the defendants 2 and 3.

The plaintiff's memorandum of Second Appeal contains 12 grounds but leaving aside the general grounds and those which relate to the binding nature of the plaintiff's sale deed on the 2nd defendant and those which relate to questions of fact, those which attack the legal validity of the 3rd defendant's title as claimed under the will Ex. V (*a*) may be shortly stated thus:—

1. "The will can only operate from the date of the death of the testator at which time all the properties would pass to the two sons by right of survivorship, being ancestral property."

2. "It is not within the scope and powers of the guardian of a minor son to conset to the giving of property by a father to a third person."

3. "The said consent is also inoperative as it was given by a person who was not the guardian at the time, when she so consented."

4. "The authorities relied upon by the Subordinate Judge are clearly distinguishable and they only refer to gifts *inter vivos* and not to testamentary dispositions."

Besides these four grounds, Mr. G. S. Ramachandra Aiyar who appeared for the appellant raised a new contention before us that the document, Ex. V (*a*) was not a will but a settlement *inter vivos* and as it was not registered, it was wholly inoperative and invalid. But this contention was not raised in the lower Courts and not even in the grounds of the Second Appeal memo., and I must decline to allow it to be raised at this stage.

As regards the 2nd and the 3rd grounds, I agree with Mr. Ramachandra Aiyar that the 2nd defendant's mother was not the legal guardian of the 2nd defendant so long as his father was alive. Her consent therefore to the testamentary dispositions under Ex. V (*a*) cannot give legal validity to the will but can only be an item of the evidence proving that the dispositions under the will were in the nature of a fair family settlement to take

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effect after the death of the testator and were intended to avoid disputes and litigation and to promote peace. Of course the father himself as guardian of his son could act in his son's interest.

I shall now consider the 1st and the 4th contentions which may be dealt with together. I think that, on the authorities, the father in a joint and undivided family can with the consent of his adult son and with the consent of his relations who are interested in a minor son of his make valid provisions by will in favour of the female members of his family provided the said provisions are reasonable in extent and value. I shall refer only to a few cases.

The first and the most important case is the Privy Council decision in *Brijraj Singh* v. *Sheodan Singh* [1]. The following sentence occurs in the judgment of their Lordships of the Privy Council at page 346, "But the property was ancestral and therefore Rao Balwant Singh, although head of the family, had no right to make a partition by will of that property among the various members of the family *except with their consent.*" The words I have italicised afford in my opinion clear indication of their Lordships' view that with "their" consent, (that is, the consent of other members of the family) a disposition of property by will by the managing member would be binding on them after his death. No doubt, the observation is an *obiter dictum* as their Lordships found in that case that the document called "will" was really a disposition *inter vivos*, but I think that the *dictum* which was so clearly laid down is binding on this court especially as in my opinion there is nothing in the Hindu Sastras opposed to the above *dictum* which (if I may say so with respect) is eminently just and equitable.

In *Kudutamma* v. *Narasimhacharyalu* [2] it was held that a Hindu brother who is the managing member of a joint Hindu family would not be acting in excess of his powers as such, in giving away a reasonable portion of the joint family property to his sisters, who though married in their father's life-time, were left, for some reason or other, without a marriage portion.

In *Anivillah Sundararamayya* v. *Cherla Seethamma* [3] it was held that a gift of 8 acres of ancestral land by a Hindu father to his daughter after marriage when the family was possessed of 200 acres of land was valid against his adult sons *even without their consent.*

1. (1913) I. L. R. 35 A. 337. 2. (1907) 17 M. L. J. 528.
3. (1911) 21 M. L. J. 695.

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Sadasiva Aiyar, J.

I shall next consider the case in *Arunachela Pillai* v. *Sampurnathachi* [1] which in my opinion is a very strong case. There the undivided paternal grandfather of a minor gave a portion of the family property (about 30 per cent in value of the whole) to his 3rd wife and daughters with the consent of his grandson's widowed mother. It was held that the gift was binding upon the grandson. The learned judges say. "It is clear that it was open to the grandfather if he had chosen and without anyone's consent to effect a partition and leave the whole of his half share to his 3rd wife and her daughters and it was in our opinion clearly for the benefit of the minor and his guardian to avoid an eventuality so injurious to his interests by consenting to the alienation effected by Ex. I." In the present case also, the testator could have separated from his two sons and taken one-third share as his separate share and given it away to his daughter, the 3rd defendant. This would have been much more to the detriment of the second defendant than the provisions made in the will by which he got half of the whole ancestral properties except the C schedule properties. In the present case, the testator could have made a gift of the C schedule properties validly to his daughter and effected a partition between his two sons *during his life-time.* But with the consent of his major son and with the consent of his minor son's mother and in what he himself as the guardian of his minor son considered to be in the interests of his said son, he made a gift by will to take effect after his death instead of by a deed to come into effect at once. I think that on the logical application of the principles laid down in the cases I have referred to above and seeing that their Lordships of the Privy Council treated the disposition by will in certain circumstances though of ancestral property as standing in the same footing as dispositions by deed *inter vivos* provided the consent of the parties to be affected is obtained, the family settlement made by will Ex. V (*a*) in this case ought to be upheld. In the result the second appeal will be dismissed with costs.

Spencer, J:—I concur.

A. V. V.

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1. (1907) 27 M. L. J. 485.

PRIVY COUNCIL.

Present:—The Lord Chancellor (Lord Buckmaster), Lord Shaw, Lord Wrenbury and Mr. Ameer Ali.

[On Appeal from the High Court of Judicature at Madras.]

T. S. Murugesam Pillai ... *Plaintiff* Appellant.*

v.

Manickavasaka Desika Pandara Sannidhi and others. *Defendants Respondents.*

P C.

Murugesam Pillai *v.* Manickavasaka Desikar.

*Mortgage—*Mutt *property—Necessary—Evidence—Recognition of mortgage by successive heads of* mutt *—Non-production of books of account—Inference therefrom.*

In a suit upon a mortgage granted over the property of a *mutt* by its head, the onus is upon the mortgagee to prove that the mortgage debt was incurred for a necessary expense of the institution itself.

Where, however, many years have elapsed since the mortgage was executed both lender and borrower being dead, and succeeding heads of the *mutt* have recognised the mortgage debt, the Court should be more easily satisfied than where the mortgage is of more recent date, or its validity has been disputed.

If the mortgagor withhold books of the *mutt* which would show the true nature of the debt, the Court is entitled to draw an inference in favour of the mortgagee.

Appeal against a decree of the Madras High Court, (*Sir Arnold White, C. J.* and *Munro, J.*) reversing a decree of the Subordinate Judge of Mayavaram.

In 1881 Manickavasaka, the Pandara Sannidhi or head of the Dharmapuram mutt, gave plaintiff's father a promissory note for Rs. 14,000 "the sum received by us to-day in cash for the expenses of our Adhinam" (Mutt). In 1883 this promissory note was exchanged for a mortgage, and in 1888 Manickavasakar's successor, in lieu of this mortgage, executed another mortgage of the *mutt* property for Rs. 20,000.

The present suit was brought upon this last mortgage. The main defence was that the debt was not incurred for the purposes of the *mutt.*

The Subordinate Judge found that it was, and decreed the suit. He relied not so much upon the oral evidence as upon the documents, the conduct of the successive Pandaras, and the proved fact that at the time when the debt was incurred the mutt was embarrassed. On appeal, the Madras High Court (White, C. J., and Munro, J.) reversed this decision and dismissed the suit, holding that it was not proved that the debt was incurred for any purpose binding on the *mutt.*

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* 23rd January, 1917.

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Hence this appeal.

Sir R. Finlay, K. C., DeGruyther, K. C. and *O'Gorman* for Appellant:—The litigation for which the money was borrowed was for the benefit of the *mutt.* This appears from the report itself in *Giyana Sambanda* v. *Kandasami* (I. L. R. 10 Mad, 375.)

[*The Lord Chancellor.*—The High Court have not said that if the money had been borrowed for the litigation the *mutt* would not have been bound, but that they are not satisfied it was borrowed for the purposes of the litigation.]

When the official in charge of a mutt mortgages the *mutt's* property there is a presumption that he is doing his duty. The mortgage was recognized by successive Pandaras, who paid interest on it from *mutt* funds. The books of the mutt would disprove our case if they showed that the *mutt* did not get the money, but they have not been produced. This justifies an inference that they do not assist the mortgagors. No doubt the burden of proof is on us to prove necessity, but after such a lapse of time and when necessity has never before been challenged very slight evidence should suffice to shift that burden.

Sir H. Erle Richards, K. C., and *Kenworthy Brown* for respondents, submitted that on the evidence the High Court had rightly held that it was not proved that the debt was incurred for the purposes of the *mutt.*

Kenworthy Brown followed:—The head of a *mutt* can only charge the *mutt* property for a real necessity: he has no greater powers than the manager for an infant heir.

Prasanna Kumari Debi v. *Golab Chand* [1], *Abhiram Goswami* v. *Shyama Charan Nandi* [2].

The burden of proving such necessity is on the mortgagee. The High Court have rightly held that in this case he has failed to discharge it.

Their Lordships' judgment was delivered (Jan. 23-1917) by

Lord Shaw.

Lord Shaw:—This is an appeal from a decree of the High Court of Judicature at Madras, dated the 18th January, 1910, which reversed a decree of the Court of the Subordinate Judge of Mayavaram, dated the 6th November, 1907.

The object of the suit is for the recovery of monies advanced under mortgage, and, in the event of default, for the sale of the hypothecated properties. The properties were those of the *Mutt,*

1. (1875) L. R. 2 I. A. 145, 152. 2. (1909) L R 36 I. A. 148, 36 C. 1003.

to be presently mentioned. The defence in substance is, that the loan over these properties, although granted by the head of the institution, was not granted in respect of any necessity of the *mutt* itself, which necessity falls to be proved.

The *Dharmapuram Adhinam* or *Mutt* is situated in the Madras Presidency. It is one of some importance, being a religious institution consisting of a group of religious houses, having various temples and other property, and endowments yielding a considerable revenue. The head of the institution is known as the *Pandara Sannadhi.* The transactions which form the subject of enquiry cover a period from about 1880 to the date of the suit, that is, a period of over a quarter of a century.

It appears to be established that in the year 1880-81 the *Mutt* had just emerged from a heavy and expensive litigation, the costs in which amounted to about a lakh of rupees. The title of Manickavasaka, the then *Pandara,* who had in 1873 succeeded to the headship of the Adhinam, had been challenged, and the litigation, which lasted from 1875 to 1879, terminated in favour of Manickavasaka. In 1881, however, a fresh suit was instituted—this time by the *Pandara* himself—in order to establish certain rights in regard to religious houses alleged to be subordinate to the main *Adhinam* of Dharmapuram. This litigation is said to have cost about 80,000 rupees, and it was partially successful. The report of the case is contained in *Giyana Sambanda Pandara Sannadhi* v. *Kandasami Tambiran* [1].

There seems little reason to doubt that in this crisis in the affairs of the *Adhinam* the obtaining of an advance was important in the interests of the institution. Accordingly, on the 8th December, 1881, Manickavasaka granted a promissory note in favour of Sadaya Pillai, who is alleged by the respondents to have been the manager of the institution, but who appears only to have been the manager of one temple. The promissory note bears that "the sum received by us to-day In cash for the expenses of our *Adhinam* is 14,000 rupees."

Shortly thereafter Sadaya Pillai died, leaving a widow and three minor sons. On the 24th June, 1883, a hypothecation bond was executed by the same *Pandara,* namely Manickavasaka, in favour of Pillai's widow and children for the sum of 14,946 rupees contained in the promissory note with certain accumulated interest.

1. (1887) I. L. R 10 M. 375.

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The bond narrates that the original promissory note had been granted, and that the sum was paid "for the expenses of the aforesaid *Adhinam.*" Various payments were made from time to time, of interest and towards the discharge of the debt.

Then in 1888 Manickavasaka died. So that it is fairly clear that so far as his actings and writings are concerned, they confirm the constitution of the debt as one for the necessary expenses of the *Adhinam.*

Manickavasaka was succeeded by Sivagnana. He also recognised the binding nature of the mortgage. He made payments from time to time under the bond up to the year 1897. On the 4th November of that year he granted a fresh mortgage for 20,000 rupees. This is the mortgage sued upon. It is admitted that the 20,000 rupees is the balance due, as the mortgage itself expresses it, under the former bond of 1883 granted by Manickavasaka, Sivagnana's predecessor: and accordingly "the bond is granted, as was the former one, over the lands belonging to the *Adhinam.*" This deed is the plainest ratification of the former transaction and of the fact that the advance had been made for the necessities of the *Mutt* itself.

In the year 1903 Sivagnana vacated office, and it is true of him, as of his predecessor, that his conduct and deeds confirm the view that the debt bound the *Mutt.*

The third *Pandara,* who is called Manickavasaka II, entered office in that year. In 1904 he made a payment of interest upon the mortgage. The validity thereof accordingly has been recognised by three generations, so to speak, of *Pandaras.*

Their Lordships have thought it right to give this narrative, because, in their opinion, the Court below has failed to attach to the transactions and actings set forth a sufficient importance.

The Board does not wish to cast any doubt upon the proposition that, in the case of mortgages granted over the security of an *Adhinam* or *Mutt* by the head thereof, it lies upon the mortgagee, or those in his right, to prove that the debt was a necessary expense of the institution itself. But it is a circumstance of great weight when holder after holder of the headship recognises and deals with the debt on that basis; and, as time goes on, this may itself come to be a not unimportant element of probation upon the issue. It must also be fully borne in mind that, with the lapse of time, the parties to the transaction may die or

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disappear. In the present case, Pillai, the lender, is dead; Manickavasaka, the borrower, is also dead; and it is conceivable that, as years elapse, in such cases nearly all the material evidence may in the course of years disappear, while the debt itself still remains, having from its initiation till almost the date of suit been recognised by all concerned as a debt truly constituted by the *Adhinam*. In such cases a Court is much more easily satisfied that the debt was properly incurred than where the transaction was itself recent, and can therefore be the subject of more exact evidence, or where the transaction, although remote, has been the subject of challenge or dispute by those charged with the interests of the institution.

The Board does not enter upon the oral evidence; having considered it, it sees no reason to disagree with the view thereof taken by the Subordinate Judge in the careful judgment which he has pronounced.

There is, it may be added, one element in the case to which their Lordships attach great weight. There is a certain body of evidence that the loan was made for the purposes of the *Mutt*; there is none to the contrary; but a more important question than even the balance of the oral evidence appears to be: What do the books of the *Mutt* disclose upon the subject? It is the habit of the heads or managers of these institutions to have books kept, and the entries are usually made in much detail and with much elaboration. They form a current record, on the financial side, of the history of the institution.

A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing accordingly to furnish to the Courts the best material for its decision. With regard to third parties, this may be right enough: they have no responsibility for the conduct of the suit; but with regard to the parties to the suit it is, in their Lordships' opinion, an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition. The present is a good instance of this bad practice. It is proved in the case by the first witness that "the *Mutt* has regular fair day-books; they are not now before the Court; ledgers are also maintainted in the *Mutt*." These ledgers and day-books were

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in the possession of the defendants or those of them who were heads of the institution, and they are not put in evidence. The proposition that these defendants challenged was that the expenses incurred had been incurred for the *Mutt* and were necessary for its purposes. The best assistance to a Court of justice would have been a scrutiny of these documents, and their Lordships feel free to conclude that if they had been by their entries confirmatory of the defendant's view the defendants would have brought them into Court. This part of the case, which in their Lordships' view is of considerable importance, is not referred to in the High Court.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, the decree of the High Court set aside, and the decree of the Court of the Subordinate Judge restored. The respondents will pay the costs of the cause since the date of the Subordinate Judge's decree and also the costs of this appeal.

Solicitors for Appellant:—*Douglas Grant.*

Solicitors for Respondent:—*T. L. Wilson & Co.*

A. P. P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir John Wallis, Chief Justice, and Mr. Justice Napier.

Pethu Aiyar ... *Appellant* * (*Plaintiff*).

v.

M. Sankaranarayana Pillai and others ... *Respondents* (*Defendants*).

Pethu Aiyar v. Sankara-narayana Pillai.

Lis pendens—Attachment—Claim petition allowed—Suit against claimant—Judgment debtor not party to claim proceedings or suit—Auction purchaser, in execution of another decree against judgment debtor pending suit—Whether gets a good title against the first attaching decree holder or subsequent purchaser in execution of his decree.

If when a decree holder has attached the property of the judgment debtor in execution of a money decree and while he is seeking to establish his right to attach and sell such property as the property of the judgment debtor by suit against a successful claimant, the judgment debtor not being a party to the claim proceedings or the subsequent suit, another decree holder attaches the same property and brings it to sale, such auction purchaser is not affected by the rule of *lis pendens* and a subsequent purchaser at a court auction in execution of the decree in execution of which claim proceedings were taken, does not acquire a good title as against the prior auction purchaser.

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* S. A. No. 720 of 1915. 20th December 1916.

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Per the Chief Justice.—Where the right to attach the property as the property of the judgment-debtor is admitted, a prior attachment by one creditor does not affect a sale under a later attachment by another; and the fact that the prior attachment is being questioned by a stranger to the suit makes no difference.

The doctrine of *lis pendens* applies only to alienations which are inconsistent with the right which may be established by the decree in the suit. As the former sale in execution proceeded on the very footing that the property belonged to the judgment-debtor, the doctrine of *lis pendens* is inapplicable to the case.

Munisami v. *Dakshinamurthi Pillai* [1], followed.

Per Napier, J:—It would make no difference in the case, even if the judgment debtor was a party to the claim proceedings, provided that he was not a party to the claim suit.

Observations in *Krishnappa Chetty* v. *Kadir Moidin Sahib* [2], disapproved.

Second appeal against the decree of the Court of the Subordinate Judge of Tinnevelly in A. S. No. 84 of 1914, preferred against the decree of the Court of the District Munsiff of Ambasamudram in O. S. No. 48 of 1913.

For the purpose of the report, the facts of the case appear sufficiently from the judgments of their Lordships.

S. Ramasawmi Aiyar for Appellant:—Defendant's purchase in execution is affected by *lis pendens* because he purchased it pending my suit under S. 283 against claimant and I succeeded ultimately. The principle of *lis pendens* applied to suits under S. 283 of the Civil Procedure Code. See *Moti Lal* v. *Karrabuddin* [3] *Sukdeo Prasad* v. *Jamna* [4] *Maharanee Inderjeet Koer* v. *Mt Pootee Begum* [5] *Krishnappa Chetty* v. *Abdul Kader Sahib* [2], and *Dinonath Ghose* v. *Shama Bibi* [6]. He purchased it in execution of a decree against both the judgment-debtor and the claimant who are husband and wife. At that time the claimant's title had been upheld and so his interest alone must have been purchased. Even if otherwise, defendant's purchase is invalid at least to the extent of one-half. If the judgment-debtor's interest alone is considered to have been purchased, the fact that he was not a party to the suit under S. 283 does not matter. He was a formal party to the claim petition, and the suit is merely a continuation of the claim proceeding.—See *Krishnappa Chetti* v. *Abdul Kader Saheb* [2]. Any alienation pending the disposal of the whole proceeding is bad. The principle of *lis pendens* applies to voluntary and involuntary alienations alike. *Sukdeo Prasad* v. *Jamna* [4]. Even in the suit the judgment-debtor must be deemed to be a party constructively.

1. (1882) I. L. R. 5 M. 371.
2. (1913) I. L. R. 38 M. 535.
3. (1897) I. L. R. 25 C. 179.
4. (1900) I. L. R. 23 A. 60.
5. (1873) 19 W. R. 197.
6. (1900) I. L. R. 28 C. 23.

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See *Vasudeo Atmaram Joshi* v. *Eknath* [1], followed in S. A. 178 of 1912. The principle of *lis pendens* will apply even if he was not a party ; but if his interest was represented by the actual party see *Kadir Moidin Maracayar* v. *Muthukrishna Aiyar* [2].

K.V. Krishnaswami Aiyar for respondent :—Firstly, the effect of the decree in the suit on the claim proceedings is to restore the attachment and another-decree-holder is not prevented from selling the judgment debtor's property attached already in another case. (See *Lalu Mulji Thakur* v. *Kashi Bai* [3] Ss. 63, 64 and Order 35, Rule 10 of the Civil Procedure Code). A suit by the attaching decree-holder is not such a suit as will fall under S. 52 of the Transfer of Property Act. It is merely a personal action. A right to attach is not a right to immoveable properties. *Anando Moya Dossee* v. *Dhonendro Chunder Mukherjee* [4]. The judgment-debtor not being a party to the suit there can be no *lis pendens*. The principle of persons not being parties are bound does not apply. See *Madavarayudu* v. *Subbamma* [5]. He was not as a matter of fact a party in the claim proceedings. He must be shown to have been served and to be intended to be bound. See *Sankara Bhatta* v. *Subbaraya Bhatta* [6] *Vadapalli Narasimham* v. *Seetharamamurthi* [7] and *Tyagaraja Mudaliar* v. *Sabapathi* [8]. The case in 38 Mad. 535 is not supported by the decisions in 35 Cal. 202 as it is supposed to be. The cases in 25 Cal. 179 and 23 All. 60 are suits by the claimant under S. 283 and are distinguishable.

S. Ramaswamy Aiyar in reply.

Section 64 of the Civil Procedure Code and S. 52 of the Transfer of Property Act enact two different principles and attachment does not create a *lis pendens*. In a suit by the attaching decree-holder the defendant-claimant's right to the property is a question within the meaning of S. 52 of the Transfer of property Act. It is not a personal action. See *Krishnappa Chetty* v. *Kader Moideen Sahib* [9].

The Court delivered the following

Wallis, C. J.

Judgments :—*The Chief Justice* :—This appeal raises the following question. If, when a decree-holder has attached the

1. (1910) I. L. R. 35 B. 79 at 89.
2. (1902) I. L. R. 26 M. 230.
3. (1886) I. L. R. 10 B. 400.
4. (1871) 14 M. I. A. 101, 109.
5. (1916) 2 M. W. N. 283.
6. (1907) I. L. R. 30 M. 585.
7. (1907) I. L. R. 31 M. 168.
8. (1913) M. W. N. 54.
9. (1913) I. L. R. 38 M. 585, 540.

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property of the judgment-debtor in execution of a money decree and while he is seeking to establish his right to attach and sell such property as the property of the judgment-debtor by suit against a successful claimant, the judgment-debtor not being a party to the claim proceedings or the subsequent suit, another decree-holder attaches the same property and brings to sale is the auction purchaser affected by the doctrine of *lis pendens* so that a subsequent purchaser at a court auction in execution of the decree in execution of which claim proceedings were taken acquires a good title as against him. In this case the first sale took place while the claim proceedings were pending at a stage when the claimant had succeeded in the suit and an appeal had been filed by the judgment-creditor which was afterwards successful. The sale was in execution of a decree against the judgment-debtor and the claimant and must be taken to have been of both their interests, but as it has since been found that the claimant had no interest, the sale may be treated merely as a sale of the judgment-debtor's interest. The case does not come within S. 64, C. P. C. which only avoids private transfers and deliveries contrary to the attachment as against all claims enforceable under the attachment and must I think be held applicable to private transfers between the date of the attachment and the final decision in any claim proceedings and the subsequent suit thereon, as held in *Sukhdeo Prasad* v. *Jamna* [1]. Again private alienations by the claimant though not strictly within the words of S. 64 must also be held to be subject to the result of that litigation as held in *Krishnappa Chetty* v. *Abdul Khader Sahib* [2]. The present case however is one of a sale in execution and it is quite clear that under the Code attachment was not intended in any way to affect attachment and sales in execution of other decrees. The Code contemplates co-existing decrees and orders for sale and contains provisions as to the court which in such a case is to have the conduct of the sale, and as to rateable distribution of the sale proceeds among the various decree-holders. This being so, can it be that the filing of a claim petition in one of the suits questioning the right to attach and the subsequent suit in which strictly speaking the only question at issue is the judgment-creditor's right to attach the property as the property of the judgment-debtor, operates under the doctrine of *lis pendens* against all sales in execution of other

1. (1900) I. L. R. 23 A. 60. 2. (1915) I. L. R. 38 M. 535.

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decrees against the judgment-debtor so as to make auction purchaser's title dependent on the result? Where the right to attach the property as the property of the judgment-debtor is admitted a prior attachment in one suit does not affect a sale under a later attachment in another suit, and it is difficult to see why the fact that the right to attach is being questioned by a stranger to the suit would make any difference. The effect of answering this question in the affirmative would be to interfere with the due working of the provisions of the Code for the simultaneous execution of several decrees against the same judgment-debtor and if it had been intended that any such result should follow when the right to attach is questioned by claim proceedings it would have been expressly provided for. This question was decided in *Lal Mulji Thakur* v. *Kashi Bai* [1] in the case of a judgment-debtor named Pitambar, where the court held that the doctrine of *lis pendens* was inapplicable on two grounds, one that the purchaser at the execution sale did not derive title from Pitambar, and the other that Pitambar was not a party to the claim suit and was not represented therein by the Plaintiff simply because the plaintiff sought to establish his right to attach and sell the property as the property of Pitambar. In this case also the judgment-debtor was not a party to the claim proceedings and the attaching creditor's subsequent suit, and the decision that he could not be considered to be represented in that suit is entirely in accord with the subsequent decisions of this court in which the question has arisen in other connections. This ground would therefore be sufficient to dispose of the present case. But even supposing the judgment-debtor to have been a party I do not consider that that would make any difference. The observations of the learned Judges that the purchaser at the court auction did not derive title from the judgment-debtor are not in accordance with the view now prevailing. There is however a broader principle which is sufficient to take the case out of the operation of S. 52 of the Transfer of Property Act, and that is that, as held in *Munisami* v. *Dakshnamurthi* [2] the doctrine of *lis pendens* applies only to alienations which are inconsistent with the right which may be established by the decree in the suit. Here the sale in execution proceeded upon the very footing that the property belonged to the judgment-debtor and the doctrine is therefore inapplicable to the case. The scheme of the code as

1. (1886) I. L. R. 10 B., 400. 2. (1882) I. L. R. 5 M. 371.

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already observed is to allow executions of money decrees to go on simultaneously, and to hold that the sale in any one suit may be made available in other suits by way of rateable distribution. The Lower Court was right and the second appeal must be dismissed with costs.

Napier, J.

Napier, J. :—The question that arises in this appeal is whether the sale by court auction of certain properties which were purchased by defendants 1 and 2 in execution of a decree obtained by the 1st defendant in Small Cause Suit No. 1766 of 1907 is good against the subsequent purchase of the same properties by the plaintiff in execution of his decree in O. S. No. 144 of 1907. It is contended by that plaintiff that the properties in question were bought by the defendants in circumstances that enable him to plead that the sale is void by virtue of the doctrine of *lis pendens*. The suit by the plaintiff was brought against the 3rd defendant and he had attached the properties in question before judgment. The suit in which defendants 1 and 2 bought the properties, was brought by the 1st defendant against defendants 3 and 4 who are husband and wife, sometime after the plaintiff's suit. Prior to the plaintiff obtaining a decree the 4th defendant, wife of the 3rd defendant, put in claim petitions (Exs. E and F) with respect to the attached properties. To these petitions she made the plaintiff a party, and not the 3rd defendant, her husband, who was the defendant in the suit. The District Munsif held an enquiry and on the 28th August 1907 allowed the claim and directed the release of the properties from attachment before judgment (vide Ex. C). The plaintiff then filed the suit O. S. No. 127 of 1908 against the 4th defendant, the claimant, not making the 3rd defendant, her husband, a party under S. 283 of the Old Civil Procedure Code (Order XXI, Rule 63 of the new Code) to establish the right which he claimed, *viz.*, the right to attach. This suit was dismissed by the District Munsif on the 28th October 1908, but the decision was reversed on appeal on the 8th September 1910. The plaintiff then applied for attachment and sale, he having meanwhile got a decree against the 3rd defendant, and he purchased the properties on the 10th November 1911 on the sale in execution of his own decree. Three years before this, on the 20th November, 1908, the 1st defendant purchased the 1st item in Court sale by himself in execution of his small cause suit decree against defendants 3 and

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4; and in October 1909 the 2nd defendant purchased the 2nd item in execution sale by the 1st defendant in the said small cause suit. There has been some contention before us as to whose interests were purchased in these last Court sales, but I am satisfied that the interests of both the 3rd and 4th defendants in the properties were sold. The result of the appeal in the claim suit is that the 4th defendant has been found to have had no interest in those properties. So we are only concerned with the effect of these sales on the interest of the 3rd defendant, the judgment-debtor in the original suit brought by the plaintiff. It is contended for the appellant that this sale was subject to his rights in the 3rd defendant's properties and that therefore he is entitled to the properties. Mr. Krishnaswami Aiyar raises two defences to this contention, *viz.*, (1) that as the judgment-debtor was not a party to either the claim proceedings on the claim suit, S. 52 of the Transfer of Property Act does not apply; and (2) as the only claim made by the plaintiff was a right to attach, that was not a right to immoveable property within the meaning of S. 52, T. P. Act, and so could not be affected by the transfer by court sale. It is now beyond dispute that involuntary sales by decree are covered by the mischief of the doctrine, though I do not think it has been decided that such sales came within the actual purview of S. 52, T. P. Act. I am inclined to think that they do not, as under S. 2 proviso (d) of the Act, "nothing herein contained shall be deemed to affect any transfer by operation of law or by or in execution of, a decree of a court, save as provided by S. 57 and Chapter IV of the Act", neither of which apply to S. 52. I will take it however that the doctrine is as stated in the language of the section.

It has been argued for the appellant, first that the judgment-debtor was a party to the claim proceedings. I cannot accept this contention as there is no evidence of any notice being served on him and it is clear that he did not appear. The fact that his name together with that of 9 other defendants appears in the heading of the claim petition, only means that the petition was in a suit to which he and the other defendants were parties. In this view, the plaintiff must fail. But I am of opinion that even if the judgment-debtor had been a party to the claim proceedings, the position of the plaintiff would have been no stronger.

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Napier, J.

Admittedly he was not a party to the claim suit. It is contended, however, on behalf of the appellant that he was constructively a party, being represented by the plaintiff, and reliance is placed on two decisions of this Court, *Kadir Mohideen Marakayar* v. *Muthukrishna Aiyar* [1], and *Krishnappa Chetty* v. *Abdul Khader Saheb* [2]. The first of these cases only decides that where on the application of the plaintiff, a certain person is entered on the record in the place of a deceased defendant as his legal representative and that person raises no objection that he was not the sole legal representative of the deceased defendant and that there were others who ought to be joined, and where no other person claiming to be co-heir has applied to have his name joined as legal representative, then that person who was so brought on the record sufficiently represents the estate of the deceased for the purpose of the suit, and in the absence of any fraud or collusion the decree passed in such suit will bind the estate. This proposition has been affirmed by the Privy Council as being necessary to protect *bona fide* purchasers at court auction. But it is no authority for the proposition now contended for. The case in *Krishnappa Chetty* v. *Abdul Khader Sahib* [2] is however in point. In that case Mr. Justice Sadasiva Aiyar thought himself bound by the decision of the Privy Council in *Phul Kumari* v. *Ghanashyam Misra* [3], to hold that the claim suit is only a continuation of the claim proceedings and that therefore a series of cases beginning with *K. I. Narain* v. *K. I. Nilakandan Nambudri* [4] in which the contrary view was taken, must be held to be overruled. The reasons given by the learned Judge for coming to that conclusion will be found stated at pages 541 to 545. The proposition which he considers to have been established by the decision of the Privy Council, is stated by him at page 544. "Suits of this class though called original suits, are not in their essence original actions but merely forms of appeal allowed by the Civil Procedure Code to be brought in the guise of original suits." With due deference to the learned Judge, I do not think that the language used by the Privy Council compels us to hold that a judgment-debtor who was a party to claim proceedings is constructively a party to a claim suit

1. (1902) I. L. R. 26 M. 230=12 M. L. J. 368.
2. (1913) I. L. R. 38 M. 535.
3. (1907) I. L. R. 35 C. 202=17 M.L. J. 618.
4. (1881) I. L. R. 4 M. 181.

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between the claimant and the attaching creditor. What was actually decided in that case (*Phul Kumari* v. *Ghanshyam Misra* 1) was that a claim suit was properly stamped with a court-fee of Rs. 10 as a suit to alter or set aside a summary decision or order of a Civil Court within the meaning of sub-section (1) of Art. 17, Schedule II of the Court-Fees Act (VII of 1870). It has been contended in the High Court that the proper fee was one calculated on the value of the decree in execution of which the claimant's property had been wrongly attached, and the High Court held that the suit was one in which consequential relief was prayed for and therefore subject to an *ad valorem* court-fee. Their Lordships of the Privy Council point out that the cause of action is the order passed on the claim petition and decide that it comes exactly within the words, "to alter or set aside an order." In explaining the action, their Lordships use the following language :— " Section 283, Civil Procedure Code, recognises such a suit as not merely an appropriate but the only mode of obtaining review in such cases." Now it is clear that in this sentence their Lordships are not using the term " review " in the technical sense given to it by the Civil Procedure Code. A little further on, their Lordships say, " Misled by the form of the action directed by S. 283, both parties have treated the action as if it were not simply a form of appeal, but as if it were unrelated to any decree forming a cause of action." I do not think that in using the words 'a form of appeal', their Lordships intended to do more than indicate that this was the method by which the effect of the order could be got rid of. Nowhere in their judgment do their Lordships express any opinion that the attaching creditor represents the judgment-debtor and no such question arose in that suit. It seems to me that all that their Lordships have decided is that the words in S. 283, *viz.*, " may in dispute ", come within the words " to alter or set aside an order of a Civil Court, because the order of a Court on a claim petition is one passed in proceedings to establish the same right which is claimed to the property in dispute. In the view I have taken on the first point, I do not think it necessary to express any opinion as to what would have been the result if the judgment-debtor had been made a party to the claim suit. The appeal will be dismissed with costs.

C. A. S.

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1. (1907) I. L. R. 35 C. 202=17 M. L. J. 618.

PRIVY COUNCIL.

Present:—Lord Parker of Waddington, Lord Sumner, Sir John Edge and Sir Lawrence Jenkins.

[On Appeal from the High Court of Judicature for the North-Western Provinces, Allahabad.]

Moti Chand and others ... *Appellants**

v.

Khwaja Ikram Ullah Khan and others ... *Respondents.*

P. C.

Moti Chand
v.
Khwaja Ikram Ullah Khan.

North-Western Provinces Tenancy Act, 1901 (*U. P. Act II of* 1901), *Ss.* 10, 20 *and* 83—*Sale of a Mahal—Agreement to surrender ex-proprietary rights void and unenforceable.*

The policy of the North-Western Provinces Tenancy Act, 1901 (U. P. Act 2 of 1901) is to secure and preserve to a proprietor whose proprietary rights in a mahal or in any portion of it are transferred otherwise than by gift or by exchange between co-sharers in the mahal a right of occupancy in his *sir* lands, and in the land which he has cultivated continuously for twelve years at the date of the transfer, and such right of occupancy is by the Act secured and preserved to the proprietor, who becomes by a transfer the ex-proprietor, whether he wishes it to be secured and preserved to him or not and notwithstanding any agreement to the contrary between him and the transferee. That policy of the Act is not to be defeated by any ingenious devices, arrangements, or agreements between a vendor and a vendee for the relinquishment by the vendor of his *sir* land or land which he has cultivated continuously for twelve years at the date of the transfer, for a reduction of purchase money on the vendor's failing or refusing to relinquish such lands; or for the vendor being liable to a suit for breach of contract on his failing or refusing to relinquish such lands.

All such devices, arrangements and agreements are in contravention of the policy of the Act and are contrary to law and are illegal and void, and cannot be enforced by the vendee in any Civil Court or in any Court of revenue.

Appeal from a judgment of the Allahabad High Court (Karamat Husain and Chamier, JJ.) which reversed a judgment of the Subordinate Judge of Azamgarh.

The facts of the case are fully set out in the judgment of the High Court *Ikramullah Khan* v. *Moti Chand* 1. The Defendants sold certain zemindari lands to the Plaintiffs and in the sale deed the Defendants contracted to relinquish their *sir* and *Khudkasht* lands and give possession thereof to the Plaintiffs or in default the Defendants would be liable in damages. The Defendants refused to deliver up possession of such lands to the Plaintiffs who brought the present suit to recover damages for breach of the covenant. The Subordinate Judge allowed the Plaintiffs claim, but the High Court held that the

* 11th December 1916.

1. (1911) I. L. R. 33 All. 695.

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contract to relinquish the *sir* lands was forbidden by law and wa- illegal and void and dismissed the suit.

Hence this appeal.

L. De Gruyther, K. C. and *B. Dube*, for the Appellants :— Submitted that there was nothing to prevent a tenant from surrendering his exproprietary holding to the Zemindar : Sec. 83 of the North-Western Provinces Tenancy Act No. 2 of 1901 in terms provided for surrender of such tenancy. The effect of the contract was that the Defendants surrendered the lands which they were authorised by law to do. The Defendants were liable to pay compensation for the breach of the contract: the law no doubt prohibited the sale of *sir* lands but the present case was merely of surrender of tenancy. There was a long series of decisions against the Appellants' view under Act 12 of 1881 and also the new Act 2 of 1901. Reference was made to the cases cited in the judgment of the High Court and to *Dipan Rai* v. *Ram Khelawan*, 1.

Dr. Abdul Majid for the Respondents was not called upon.

The judgment of their Lordships was delivered (11-12-1916) by

Sir John Edge.

Sir John Edge:—This is an appeal from a decree, dated the 24th May, 1911, of the High Court of Judicature at Allahabad, which set aside a decree of the Subordinate Judge of Azamgarh, and dismissed the suit of the plaintiffs. The suit was brought to recover damages for an alleged breach by the defendants of an agreement contained in a sale deed of the 2nd May, 1903, by which the defendants had agreed to execute and file a deed of relinquishment of their rights in their "sir" lands in Mouza Khorant, Daulsapur and Bharthipur, in the district of Azamgarh. The Mouzas in question are mahals within the meaning of "The North-Western Provinces Tenancy Act, 1901" (Act II of 1901).

The defendants, who were the proprietors within the meaning of that Act of Mouzas Khorant, Daulsapur and Bharthipur, and had in those Mouzas considerable "sir" lands in their occupation to which the Act applied, by their deed of the 2nd May, 1903, transferred by sale to the plaintiffs the three Mouzas and all the rights appertaining to the zamindari property. By the deed the defendants also purported to sell to the plaintiffs the zamindari

1. (1910) I. L. R. 32 All. 383.

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Sir John Edge.

property " together with 'sir' and 'khudkasht' lands, and ex-proprietary tenancy right without the exception of anything or right"; declared that, "we, the executants, have relinquished our claims and interest in respect of all the 'sir' and 'khudkasht' lands"; and agreed that—

"We shall execute a deed of relinquishment of claim in respect of the 'sir' "lands, and shall file an application surrendering the holding. If we should "make a delay in or take any objection to the filing of an application surrendering the holding or to the execution of the deed of relinquishment of claim "in respect of the 'sir' lands, or should we, the executant, our heirs or "representatives or successors, keep in our possession any portion of the 'sir' "and 'khudkasht' lands, then we and our heirs and representatives and successors shall pay damages in respect thereof at the rate of 16 rupees per bigha. In "case of non-payment, the vendees shall have power to bring a suit in a "competent Court and to realise the amount of damages at the above rate from "the person and property of us the executants, and our heirs and representatives "and successors. We, the executants, shall have no objection to pay it."

At the time of the execution of the sale deed of the 2nd May 1903, the plaintiffs were not nor were any of them proprietors, landholders, or co-sharers in the Mouzas or in any of them.

On the 5th May, 1903, and in pursuance of the agreement in that respect contained in the sale deed of the 2nd May, 1903, the defendants executed a deed of relinquishment, in favour of the plaintiffs, of their claim and right in all their "sir" lands in the three Mouzas; they, however, refused to file the deed of relinquishment in the Revenue Court, and on the 14th July, 1903, refused to quit possession of the "sir" lands, of which they have since then continued in possession as ex-proprietary tenants. In respect of that refusal to file the deed of relinquishment or to quit possession of the "sir" lands, this suit for damages was brought in the Court of the Subordinate Judge of Azamgarh on the 3rd July, 1909. The damages claimed were at the rate of 16 rupees per bigha, amounting to 9,468 rupees 8 annas, with interest thereon at the rate of 8 annas per centum per mensem from the 14th July, 1903, to the 3rd July, 1909. The total amount of the claim, including interest, was Rs. 12,837-5-9.

The Subordinate Judge gave the plaintiffs a decree for the amount claimed, with costs, and interest thereon at the rate of 8 annas per centum per mensem to the date of realisation. The High Court, on appeal, holding that the transaction as to the "sir" lands, whether it was to be regarded as an attempted sale of ex-proprietary rights or an agreement to relinquish those

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rights when they should arise, was unlawful, decided that the claim for damages for breach of the agreement could not be maintained, and dismissed the suit. There was abundant authority for that conclusion to be found in the decisions of the High Court on the effect of Act II of 1901, and of the previous Act XII of 1881.

In S. 10 of Act II of 1901 it is enacted, so far as is material for present consideration, that—

"(1.) Every proprietor whose proprietary rights in a mahal, or in any portion "thereof, whether in any share therein or in any specific area thereof, are "transferred, on or after the commencement of this Act, either by sale in execution "of a decree or order of a Civil or Revenue Court or by voluntary alienation, "otherwise than by gift or by exchange between co-sharers in the mahal, shall "become a tenant, with a right of occupancy in his 'sir' land, and in the land "which he has cultivated continuously for twelve years at the date of the transfer "and shall be entitled to hold the same at a rent which shall be four annas in "the rupee less than the rate generally payable by non-occupancy tenants for land "of similar quality, and with similar advantages in the neighbourhood.

"(2) A usufructuary mortgage shall be deemed to be a transfer within the "meaning of this section.

* * * *

"(4.) Every such tenant, and every tenant having the same rights under the "corresponding provisions of Act XVIII of 1873, Act XII of 1881, or any other "enactment for the time being in force, shall be called an ex-proprietary tenant, "and, save as otherwise expressly provided, shall have all the rights and be subject "to all the liabilities conferred and imposed upon occupancy tenants by this Act.

"(5.) The land in which such occupancy right has been created shall be "specified, and the rent payable therefor shall be fixed by the Collector under "S. 86 of the North-Western Provinces and Oudh Land Revenue Act, 1901."

In Section 20 of Act II of 1901 it is, enacted:—

"(2.) The interest of an ex-proprietary tenant, an occupancy tenant, or a "non-occupancy tenant other than a 'thekadar' is, subject to the provisions of "this Act, heritable, but is not transferable in execution of a decree of a Civil or "Revenue Court, or otherwise than by voluntary transfer between persons in "favour of whom, as co-sharers in the tenancy, such right originally arose, or who "have become by succession co-sharers therein."

In S. 83 of Act II of 1901 it is amongst other things, enacted:—

"(1) A tenant, not bound by a lease or other agreement for a fixed period, "may, at the end of any agricultural year, surrender his holding but he shall not "be entitled to surrender a portion only of his holding.

* * * *

"(3.) Nothing in this section shall affect any arrangement by which a tenant "and his land-holder may agree to the surrender of the whole or any portion of "a holding"

The Subordinate Judge apparently considered that clause (3) of Section 83 had some bearing upon the facts of the case.

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Their Lordships cannot regard the agreement for relinquishment by the defendants in the sale deed of the 2nd May, 1903, and the execution by the defendants of the deed of relinquishment of the 5th May, 1903, as separate and distinct transactions. The execution of the deed of relinquishment on the 5th May, 1903, was merely a step taken towards giving effect to the agreement for relinquishment which was contained in the sale deed of the 2nd May, 1903, and was not an arrangement between a tenant and his landlord. The relation of landlord and tenant did not exist between the plaintiffs and the defendants at the time when the sale deed of the 2nd May, 1903, was executed.

It appears to their Lordships that it cannot be doubted that the policy of Act II of 1901 is to secure and preserve to a proprietor whose proprietary rights in a mahal or in any portion of it are transferred otherwise than by gift or by exchange between co-sharers in the mahal a right of occupancy in his "sir" lands, and in the land which he has cultivated continuously for twelve years at the date of the transfer, and that such right of occupancy is by the Act secured and preserved to the proprietor, who becomes by a transfer the ex-proprietor, whether he wishes it to be secured and preserved to him or not and notwithstanding any agreement to the contrary between him and the transferee. The policy of the Act is not to be defeated by any ingenious devices, arrangements, or agreements between a vendor and a vendee for the relinquishment by the vendor of his "sir" land or land which he has cultivated continuously for twelve years at the date of the transfer; for a reduction of purchase money on the vendor's failing or refusing to relinquish such lands; or for the vendor being liable to a suit for breach of contract on his failing or refusing to relinquish such lands. All such devices, arrangements, and agreements are in contravention of the policy of the Act and are contrary to law and are illegal and void, and cannot be enforced by the vendee in any Civil Court or in any Court of Revenue.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for Appellant :—*T. L. Wilson & Co.*

Solicitors for Respondents :—*Truefitt and Francis.*

A. P. P.

PRIVY COUNCIL.

[On Appeal from the Court of the Judicial Commissioner of Oudh].

Present:—Lord Parker of Waddington, Lord Sumner, Sir John Edge and Sir Lawrence Jenkins.

Raja Mahammad Abdul Hussan Khan ... *Plaintiff** (*Appellant*)

v.

Prag and others ... (*Defendants*) *Respondents.*

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Abdul Hussan Khan *v.* Prag.

Oudh Rent Act (22 *of* 1886)—*Oudh Rent Act* (1886) *Amendment Act* (*No.* 3 *of* 1901)—*Jurisdiction—Revenue Court—Civil Court—Proprietor—Tenant—Ejectment—Proprietary and Under-proprietary right—Declaration that the holding of lands is merely as tenant—Cause of action.*

In Oudh, in cases to which the Oudh Rent Act (1886) Amendment Act, 1901 (Act 3 of 1901) applies, the Court of Revenue has the exclusive jurisdiction to determine what is the status of a tenant of lands, and what are the special or other terms on which such tenant holds, and the Civil Court has the exclusive jurisdiction to decide whether or not a person in possession of lands holds a proprietary or an under proprietary right in the lands.

In a suit by the plaintiff, whose suit to evict the deft. had been dismissed by the Revenue Court on the ground that the latter had under-proprietary rights, for a declaration that he had neither proprietary nor under-proprietary right therein and for possession on proof that the defendant is merely a tenant the claim for a decree for possession must be dismissed for want of jurisdiction, but the plaintiff is entitled to the declaration prayed for.

Where the Revenue Court had decided that the holders of a village were in 1852 owners of zamindari rights in the village, that they had not lost those rights, that it must be presumed that they were not ordinary tenants, and that the proprietor of the village should prove in the Civil Court that they were ordinary lessees, and the proprietor then brought a suit in the Civil Court for a declaration that they had no proprietary rights of the nature of zamindari, superior or inferior, in the village, and also for a declaration that the decision of the Revenue Court did not affect his rights.

Held, that the decision of the Revenue Court, which was subsequently acted upon in the preparation of the Khewat of the village, made it necessary for the proprietor to bring the suit, and that the fact that the holders of the village did not in their written statement in the suit set up that they had any proprietary or under-proprietary right, did not disentitle the proprietor to the declarations which he claimed.

Two consolidated appeals from two judgments and decree of the Court of the Judicial Commissioner at Oudh (Lindsay and Kanhaiya Lal, J. C), dated 26th April 1914, which reversed the judgments and decrees of the Subordinate Judge of Gonda.

* 30th November 1916.

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The appellant is admittedly the Zamindar. He sued for among other reliefs a declaration that the defendants did not possess any proprietary or under-proprietary right in the villages held by them. The Subordinate Judge found for the plaintiff and made decrees giving the declaratory relief sought by the plaintiff. The Judicial Commissioners refused to make the declaration although they agreed with the Subordinate Judge that the Defendants had no proprietary or under-proprietary rights. They were of opinion that the defendants were admittedly tenants and that the nature or terms of their tenancy could be determined by a Revenue Court only and not by the Civil Court. Hence these appeals, which were heard *ex-parte.*

L. De Gruyther, K. C. and *Dube*, for the Appellant.—Submitted that the plaintiff had a good cause of action for the suit, and that on the findings the Appellate Court had erroneously refused to grant declaratory relief. The defendants had undoubtedly claimed under-proprietary rights but that claim had been negatived by the findings of the Court below. Reference was made to Act 22 of 1886, S. 53 and to Act 3 of 1901, S. 44.

[Their Lordships stopped Counsel for the Appellant in the course of argument and reserved judgment].

The Respondents did not appear.

The judgment of their Lordships was delivered (30th December 1916) by

Sir John Edge.

Sir John Edge.—These are two consolidated appeals. The appellant in each of these appeals, Raja Mohammad Abdul Husan Khan, is the plaintiff in the suit in which the appeal has arisen. The suits were brought to obtain the decision of the Civil Court as to the status of the defendants in two villages in Oudh. The title of the plaintiff as proprietor within the meaning of that term in Act XXII of 1886 and Act III of 1901 was not in dispute in either suit. In one of these suits Ram Pargash is the defendant and in the appeal relating to that suit he is the respondent here. In the other suit Prag, Bhagwan Dat, and Suraj Bali were the defendants. Prag, Bhagwan Dat, and the representatives of Suraj Bali, who has died, are the respondents here in the appeal which relates to that suit.

In the suit in which Ram Pargash is the defendant the plaintiff asked for a decree for the proprietary possession of Mouza Kauria Pirhia and for a declaration that Ram Pargash had no

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proprietary right and no under-proprietary right in that village. Ram Pargash claimed that he had an under-proprietary right in the village. The Subordinate Judge of Gonda, who tried the suit, found on the evidence that Ram Pargash had no proprietary or under-proprietary right in the village and was merely a tenant. On that finding the Civil Court had no jurisdiction to give the plaintiff a decree for possession, and accordingly dismissed the suit, so far as the claim to eject the tenant was concerned, an ejectment of a tenant to whom Act III of 1901 applies being in Oudh exclusively within the jurisdiction of the Court of Revenue. The Subordinate Judge rightly on his findings gave the plaintiff a decree on the 26th August, 1912, declaring that Ram Pargash had no proprietary or under-proprietary right in the village. That declaration the Civil Court was competent to make, and it was necessary that it should be made by the Civil Court, as the Court of Revenue, holding that Ram Pargash had an under-proprietary right in the village, had declined jurisdiction in proceedings for the ejectment of Ram Pargash which the plaintiff had brought in the Court of Revenue. The question as to whether Ram Pargash had or had not a proprietary or an under-proprietary right was one for the Civil Court and when raised and persisted in was one which the Court of Revenue could not finally decide.

From that decree of the 26th August, 1912, Ram Pargash appealed to the Court of the Judicial Commissioner of Oudh. The Court of the Judicial Commissioner agreed with the Subordinate Judge that Ram Pargash had failed to prove that he had any proprietary or under-proprietary right in the village and as their Lordships understand the judgment of the Court of the Judicial Commissioner, that Court held that Ram Pargash was a tenant, as alleged by the plaintiff, but for some reason which is not apparent, that Court declined to affirm the declaration which the Subordinate Judge had made, and by its decree of the 28th April, 1914, dismissed the suit. From that decree one of these appeals has been brought. The plaintiff was entitled to the declaration which had been made by the Subordinate Judge.

In the suit in which Prag, Bhagwan Dat, and Suraj Bali were the defendants, the plaintiff asked for a declaration that those defendants had no proprietary right of the nature of Zamindari,

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superior or inferior, in Mouza Mahadeo, and for a declaration that a decision of the Board of Revenue of the 26th March, 1897, did not affect his rights. That decision of the Board of Revenue was in effect that Prag, Bhagwan Dat, and Suraj Bali were in 1852 owners of Zamindari rights in the village; that there was nothing to show that they had ever lost their Zamindari rights; that there was reasonable ground for presuming that they were not ordinary lessees; and that it was for Saiyid Ashgar Husain (the predecessor in title of plaintiff) to prove in the Civil Court that they were ordinary lessees. In their written statement in this suit, Prag, Bhagwan Dat, and Suraj Bali alleged that they were perpetual Thekadars of the village; they did not set up any right to possession, by virtue of any proprietary or under-proprietary rights; and they pleaded that the suit could not be maintained in a Civil Court. As their Lordships understand the pleadings, the defendants were not by their written pleadings claiming to hold any proprietary or under-proprietary right in the village, or any position in the village other than that of tenants. But they had in 1895 filed objections in the Court of Revenue, in reply to a notice of ejectment issued by the predecessor in title of the plaintiff, in which they claimed to be in possession of Mouza Mahadeo as Zamindars, and in this suit they tried to prove certain alleged acts of theirs which, if established, would tend to suggest that they held a proprietary right in the village. The Subordinate Judge of Gonda gave the plaintiff a decree on the 20th September, 1912, for the two declarations for which he had asked in his plaint.

From the decree of the 20th September, 1912, Prag, Bhagwan Dat, and Suraj Bali appealed to the Court of the Judicial Commissioner of Oudh. The Court of the Judicial Commissioner held that Prag, Bhagwan Dat and Suraj Bali did not claim any proprietary or under-proprietary right in their written statement, and overlooking the fact that they had previously claimed to be Zamindars of the village, and the fact that in the suit they had put forward evidence which tended to show that they held Zamindari rights in the village, dismissed the suit on the 28th April, 1914. From that decree the other of these appeals has been brought.

It is clear that in Oudh, in cases to which Act III of 1901 applies, the Court of Revenue has the exclusive jurisdiction to

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determine what is the status of a tenant of lands, and what are the special or other terms upon which such tenant holds, and that the Civil Courts have the exclusive jurisdiction to decide whether or not a person in possession of lands holds a proprietary or an under-proprietary right in the lands. The decision of the Board of Revenue of the 26th March, 1897, which was subsequently acted upon in the preparation of the Khewat of Mouza Mahadeo, made it necessary for the plaintiff to bring the suit to establish that Prag, Bhagwan Dat and Suraj Bali had no proprietary or under-proprietary right in the village, and the fact that the defendants did not in their written statement in this suit set up that they had any proprietary or under-proprietary right, did not disentitle the plaintiff to the declarations which he claimed as against them and which the Subordinate Judge had rightly given to him.

Their Lordships will humbly advise His Majesty that these appeals should be allowed with costs, that the appeals to the Court of the Judicial Commissioner of Oudh should be dismissed with costs, and that the decrees of the Subordinate Judge of Gonda should be restored.

Solicitors for Appellant :—*Watkins and Hunter.*

A. P. P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

P. V. Naganatha Sastri ... *Appellant* in S. A. No. 835 of 15 and Respondent in S. A. No. 1349 of 1915. (Plaintiff.)*

v.

N. P. Subramania Iyer ... *Respondent in S. A. No. 835 of 1915 and Appellant in S. A. No. 1349 of 1915 (Defendant).*

Naganatha Sastri v. Subramania Iyer.

Defamation—Suit for damages—Question whether writing is defamatory of plaintiff—Quantum of damages—Questions of fact—No interference in second appeal—Professional Etiquette—Duty of Counsel in; accepting and conducting cases

The question whether a letter published in a newspaper is defamatory of the plaintiff or which portion of it is defamatory is one of fact on which the High Court in second appeal, is bound by the findings of the lower appellate court.

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* S. A. Nos. 835 and 1349, of 1915. 24th January 1917.

Naganatha Sastri v. Subramania Iyer.

The *quantum* of damages awardable to the plaintiff in an action for libel is also a question of fact.

Observations of *Sadasiva Iyer, J.* on the value of English decisions on the law of libel, as precedents for Indian Courts and on the duty of counsel in accepting and conducting cases.

Houlton v. *Jones*, [1] ref.

Second appeals against the decrees of the Court of the Subordinate Judge of Kumbakonum in A. S. Nos. 165 and 173 of 1914, preferred against the decrees of the Court of the District Munsif of Tanjore in O. S. No. 559 of 1912.

Facts :—Suit for recovery of Rs. 2,000 as damages in respect of a libel published of and concerning the plaintiff. The plaintiff is a first grade pleader practising in Tanjore and the defendant was examined as a witness in a case in which the plaintiff was engaged to argue. The plaintiff however had nothing to do with the examination of witnesses but was engaged only after that stage of the case. Sometime after the termination of the case, the defendant wrote the following letter (Ex. A.) to the " Madras Standard" a daily newspaper with a modest circulation at Tanjore :—

THE VAKIL AND THE WITNESS.

SIR.—Is the witness in a court of law a person whom the Vakil could freely hold up to scorn ? Is it the privilege of the Vakil to scoff at and ridicule the witness as bitterly as he may without regard to the rules of courtesy and manliness ? Are there no passages in the Law books to define the behaviour of the Vakil to the witness whom he happens to examine ? There are Vakils who strictly confine themselves to the four walls of their case. Questions of fact and of law are so arranged, and presented in such fashion as to carry the hearer forward, if not easily, at least clearly and unequivocally. Such legal luminaries indulge in no sentimentality, but in a faultless, serene, and enlightening statement of their cause in a style impressively exalted. The mind of the witness is purified by their examination. And, as Lord Beaconsfield put it, they are not " inebriated with the exuberance of their own verbosity. " The number of this class of Vakils is rapidly decreasing, to the great discredit of the legal profession. Their place is being gradually taken by a type of Vakils who have nothing in common with the grand figures of modern times, we

1. (1910) A. C. 20.

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have known in the field. They mistake senseless energy for enthusiasm, and taking undue advantage of their privilege in courts as Vakils, censure the witness without confuting his evidence. When they see no chance for the success of their cause under the provisions of the law and on the strength of evidence, they lose their limits and like a hound let loose, scatter censure on the witness with lavish profusion in the vain hope of manifesting their own legal superiority. Now, I suppose, a man does not lose his right to be treated as a gentleman, for the simple reason that he has appeared in the Law Court to give evidence. The moment the Vakil feels that his ground cut from under his feet, he becomes the slave of a senseless disorder as though caught up by a hurricane. The presiding Judge or Magistrate is, of course, aware of the wretched mental state of the Vakil, but, in almost all instances, he is very reluctant to give him the snub that he deserves. For the sake of the self-respect of all witnesses and for all others, who may have to be quoted by the Vakil, it must be borne in mind by my friends of the legal profession that (1) flippancy is a very poor substitute for reason; (2) that fluency of speech without intrinsic nobleness and contempt of trifles, is mere saucy rhodomontade; (3) that galling criticism is likely to cause personal violence, now, or, in the long run; (4) that it is *no success* to try to humiliate a witness to the dust; (5) that all the hap in the case depends on fact and on law; (6) that he must respect the self-respect of the witness and must be studiously moderate in phraseology. These reflections have very often passed in my mind never more impressively than when I was listening to the address of Mr. P. V. Naganadha Sastri in the Court of Mr.—*where I was obliged to shrink at his vivacity and pay an apparent deference to his energy of mere cleverness. I was reminded of Faust, who, when overcome by sophistry, exclaimed: "He who is determined to be right, and has but a tongue, will be right undoubtedly." I commend this to Mr. Sastri and beg his pardon for plain speaking.*

In answer to a letter addressed to the defendant by the plaintiff's legal advisers demanding reparation, he replied as follows:—

"I am in receipt of your letter of the 10th instant. I do not think that there is anything in the article calculated to offend

Mr. Sastri. If there were, I can only say how sincerely sorry I am."

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Not satisfied with the defendant's apology, plaintiff instituted a suit for damages.

The District Munsif found that the whole article was highly defamatory of the plaintiff, that the defendant failed in his plea of justification with regard to a greater portion of the libel, and that the writing in question was not a fair and *bona fide* comment on a matter of public interest. In the result he awarded Rs. 500 as damages and costs to the plaintiff. Both parties preferred appeals from his decision. The material portions of the appellate judgment are extracted below :—

"The first question for consideration is whether Ex. A defames plaintiff and if so, to what extent..........

I am therefore unable to agree with the District Munsif in finding that the whole of the article reflects on the plaintiff personally or his performance in the criminal case. But I would confine the responsibility of the defendant to plaintiff only in respect of what defendant has specifically stated about plaintiff at the end of the article (beginning with, "I was obliged to shrink at his vivacity" up to the end of the article.)

To say of a pleader that he was sophistical is not in my opinion defamatory. Pleaders who have been engaged to support a bad case have necessarily to be sophistical to some extent. The ethics of the profession is not absolute.

Members of the profession have no duty to judge of the case for themselves before accepting an engagement.........

The reference to the necessity of the determination to be right as pre-requisite in an advocate to be undoubtedly in the right, contained in the quotation from Goethe's Faust and commended to plaintiff and apologised for by defendant in the concluding sentence as a piece of plain speaking is defamatory of plaintiff as a man though not as a member of the profession. Though it will not deter clients from rushing to him as an able advocate, it may lower him in the estimation of the Judges and righteous fellowmen. I therefore find that defendant has defamed plantiff to this extent and not more."

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"There remains only the question of damages. The magnitude of the defamation as I have found has been considerably reduced......Plaintiff left the question of damages entirely in the hands of the Court. In these circumstances, I award only nominal damages. In the view I have taken of the nature and scope of the defamatory statement in the article, I assess and award only Rs. 10 therefor."

Both the parties preferred second appeals against the decision of the Subordinate Judge.

The Hon. Mr. T. Rangachariar and *P. R. Ganapathy Iyer* for the Appellant in S. A. 835 of 1915.

G. S. Ramachandra Iyer for the Respondent.

The Court delivered the following

Sadasiva Aiyar, J.

Judgments :—*Sadasiva Aiyar, J.*:—These two connected appeals arise out of the same suit brought by the plaintiff, a leading Vakil of the Tanjore bar, for the recovery of Rs. 2,000 for damages for the libel contained in a letter sent to the Madras Standard by the Defendant and published in that paper on the 22nd August 1912. The letter is marked as Ex. A in the case. The District Munsif awarded Rs. 500 damages and full costs. Both sides appealed and the learned Subordinate Judge on appeal reduced the damages to Rs. 10 but awarded full costs to the plaintiff in the defendant's appeal and dismissed the plaintiff's appeal without costs. In the defendant's Second Appeal No. 1349 of 1915 Mr. G. S. Ramachandra Aiyar argues that only the last 11 lines of Exhibit A were intended by him to refer to the plaintiff and that even as regards the matter contained in those 11 lines his letter amounts to a fair comment *bona fide* upon the plaintiff's conduct as vakil putting forward arguments in a particular mode in a case conducted by him and that therefore he is not liable, in law, to the plaintiff for such comments.

I think the question whether the whole of the writing or any part of that writing would be construed by an ordinary reader to refer to plaintiff is a question of fact which in English courts would be left to a jury, and where the jury arrives at their verdict on this particular point through a misconstruction of the writing read as a whole or through other circumstances appearing in the case, that verdict is a verdict upon a question of fact. While therefore, I am of opinion that the Subordinate Judge in arriving at his

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conclusion that the first portion of the letter Exhibit A would not be read by an ordinary newspaper reader as referring to the plaintiff, did so through a construction of the letter which according to legal canons of construction was wholly unjustified. I am unable to hold that his finding as to the implication that would be put by an ordinary newspaper reader on that portion of the letter A, (that is whether it referred to the plaintiff or not) is not a question of fact but one of law and is therefore open to be questioned in Second Appeal.

As regards the remaining portions (that is, the last 11 lines) they clearly accuse Mr. Naganatha Sastri of the six faults, numbered 1 to 6 in the next previous portion, and also of sophistry. The defendant in his own evidence admits that Mr. Naganatha Sastri was not guilty, in the conduct of the case, of five of the above seven faults. If, however, an ordinary reader would read the document as charging Mr. Naganatha Sastri with these five faults also, then, the defendant is clearly guilty of libel. The defendant's appeal therefore must be dismissed with costs.

As regards the plaintiff's second appeal it is valued at Rs. 1,990. I find from the Subordinate Judge's judgment that the plaintiff left the question of the quantum of damages entirely in the hands of that court. That Court in respect of the defamatory matter contained in the last eleven lines assessed the damages at Rs. 10 and in respect of the whole letter (if the whole was a libel on plaintiff) at Rs. 100. I think, therefore, that the plaintiff's appeal on the question of the inadequacy of damages should have been confined to the difference between the one hundred rupees and the ten rupees, that is, to ninety. I have already observed in considering the defendant's appeal, that the question whether the first portion of the letter applied to plaintiff is a question of fact with which I cannot interfere in Second Appeal. The question of damages is also a question of fact. The plaintiff's appeal is therefore also dismissed with costs.

In thus confirming the judgment of the Subordinate Judge I should not be understood as affirming all the observations as to the ethics of the profession contained in that judgment. The remark that "members of the profession have no duty to judge of the case for themselves before accepting an engagement" seems to me to be too broadly stated. I think the tendency in modern

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times is to expect from the legal profession a greater amount of care and conscience in accepting engagements and in putting forward arguments than was thought sufficient in the days of Lord Erskine or Lord Brougham when the duty of practitioners to clients was exalted to such an extent as to obscure the duty of the practitioner to see that his own delicacy of conscience and sense of right is not gradually blunted and that his position as a promoter of justice and a helper of the Court in its administration is not gradually made subordinate to his position as a mere paid advocate of the claims of others.

I shall notice also very shortly, two points referred to by Mr. T. Rangachariar in the course of his argument. He referred to the House of Lords' case in *E. Houlton and Co.* v. *Jones*[1] to support his position that whether the plaintiff was intended or not to be attacked, the defendant would be liable if an ordinary reader would reasonably come to that conclusion. Supposing that the English Law as developed by English precedents is to that effect, I do not see why the Indian Law should follow suit unless the doctrine is in consonance with justice, equity and good conscience. I am strongly of opinion that the dissenting opinion of Lord Justice Fletcher Moulton on the question (an opinion which was expressed in the same case when it was before the Court of appeal) (See *Jones* v. *E. Houlton and Co.*, [2]) is much more in consonance with justice and equity than the law, as now settled in England on this point. The other point mentioned by Mr. T, Rangachariar is that penal and exemplary damages ought to be awarded in such cases as the present. I shall content myself with observing that the whole doctrine of penal and exemplary damages is due to the illegitimate encroachment of the considerations of punishment by fine in criminal jurisprudence into the realms of civil litigation and I wholly deprecate the introduction of such complications of the English system into India.

I wish to remark in conclusion that the plaintiff would have been better advised if he had treated the whole matter even in the beginning with indifference (I shall not say contempt). At any rate, he should not in my opinion have pursued the matter in the Appellate Court after he had obtained a judgment in the First Court, nor have filed a second appeal in this court after both courts

1. (1910) L. R. A. C. 20

2. (1909) 2 K. B. p. 458 to 476.

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had decided in his favour that the defendant was not justified in his attacking the plaintiff, though they differed as to whether the whole of the letter or only a portion constituted such attack.

Spencer, J:—I entirely agree with what has fallen from my learned brother as to the undesirability of this matter having formed the subject of a civil action after the defendant had tendered an apology.

The Subordinate Judge found as a finding on a question of fact, that only the latter part of the newspaper publication referred to the plaintiff.

It has been argued that as the alleged libel itself is contained in a document it is open to us to interpret this document according as we think proper. In my opinion it is not the legal construction which is to be put on this document that we have to consider, but what an ordinary person would understand by the language used and this is a matter which would be in a case tried with a jury a question for the jury to decide. Therefore whether the first part of the article referred to the plaintiff or not is a question of fact which we cannot go into in Second Appeal. I am not prepared to say that, if this matter had come before us in first appeal, I should have taken the same view as the Subordinate Judge has taken.

Then as to the questions of justification, fair comment and *bona fides*, these also are questions of fact and the first court found them against the defendant in paragraphs 21, 22 and 24 of its judgment and the learned Subordinate Judge agreed with the District Munsif. It has always been held that although it is a question for the Judge to say whether if certain facts were proved they would amount to justification, yet it is a question for the jury to say whether an article complained of is a fair comment on a matter of public interest. It is only where the article is so clearly fair that there can be no question of libel on the admitted facts that a judge may stop the case. We must therefore accept the findings as to fair comment and *bona fides*.

The quantum of damages is also a question of fact and even were it otherwise, the circumstances of this case do not seem to require any interference.

I therefore agree that both appeals should be dismissed with costs.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

Chinna Rajamanarru ... *Petitioner** (*1st Respondent in A. S. No. 338 of 1913 on the file of the High Court*).

v.

Lingamallu Radhakrishnayya and another. *Respondent* (*Appellant and 2nd Respondent*).

Rajamanarru v. Radhakrishnayya.

Civil Procedure Code, S. 110—*Appeal to Privy Council—Final decree involving indirectly question respecting property of the amount or value of Rs.* 10,000—*Suit for a legacy under a will—Value of legacy less than Rs.* 10,000—*Source from which legacy payable—Decision becoming an authority in the case of other legacies—Appealability to Privy Council.*

Where the High Court gave a decision which related to the source from which a legacy of less than Rs. 10,000 in value was payable, the fact that the decision may be relied on as an authority in the case of other legacies under the will, though not as an estoppel, does not render the decision appealable under S. 110 of the Civil Procedure Code as indirectly involving a claim or question respecting property over ten thousand rupees in value. A claim for a smaller sum could be said to involve indirectly a claim or question relating to property over ten thousand rupees in value, when the smaller decree has the effect of estopping either by the rule of *res judicata* or otherwise the party from claiming rights under the larger claim.

Petition presented under Ss. 109 and 110 and Order 45 Rules 2 and 3 of the Code of Civil Procedure praying that in the circumstances stated therein and in the affidavit filed therewith, the High Court will be pleased to grant a certificate to enable the petitioner to appeal to His Majesty in Council against the decree of the High Court in Appeal No. 338 of 1913 preferred against the decree of the Court of the Subordinate Judge of Cocanada in O. S. No. 11 of 1910.

A. Krishnaswami Aiyar for the Petitioner.

T. Ramachandra Rao for the Respondent.

The Court made the following

Order:—This is an application for leave to appeal to His Majesty in Council. It was admitted that the value of the subject-matter was below ten thousand rupees in the suit and in the appeal to this Court. Mr. Krishnaswami Aiyar made a faint suggestion that as at the time of the presentation of the petition, the decree amount with subsequent interest thereon aggregated to ten thousand Rupees, his client was entitled to appeal. This contention is clearly untenable.

* C. M. P. No. 2075 of 1916. 24th October 1916.

The real question is whether the *decree* of this court indirectly involved a claim or question respecting property over ten thousand rupees in value.

The suit was instituted for a legacy under the will of a testator. One of the questions related to the source from which the legacy was payable. It may be conceded that the reasons for our conclusion about the source would be applicable to other legacies payable under the will, and that the amounts covered by all the legacies would exceed ten thousand rupees in value. It is, therefore, probable that our decision in the present case may be quoted as an authority in the cases that may be, but which have not yet been, instituted by other legatees. It is not suggested that our decision would conclude the other claims. Is the probability of our decision being relied upon in similar cases arising under the same will sufficient to bring it within the second clause of S. 110? We think not. That clause refers to a *decree* involving a claim. There must be something in the decree which affects the larger subject-matter. For example, there may be a suit to recover interest upon a heavy claim based on a document. In refusing interest, the Court may hold that the document is not genuine or is not binding. In such cases, although the claim for interest might relate to a sum below ten thousand rupees, the decree indirectly would involve the rejection of a claim for the principal amount as well. In effect, the smaller decree must have the effect of estopping either by the rule of *res judicata* or otherwise the party from claiming rights under the larger claim. The decision in *Sri Kishen Lal* v. *Kashmiro,* [1] is reconcilable with this proposition. As for *Afzal Hossain* v. *Mussamat Umda Bibi,* [2] it is enough to point out that the learned Judges granted leave under S. 109 (c) and not under S. 110 of the Code. It was held in *Moofti Mahammad Ubdoollah* v. *Baboo Motichand,* [3] that where separate suits, each being for a sum less than Rs. 10,000, but involving the same contention were decreed, no leave should be granted against either or both of them, as neither of them directly or indirectly involved a claim for over Rs. 10,000. Applying that analogy, supposing different suits were brought by different legatees, under the will in question and separate judgments were

1. (1913) I. L. R. 35 A. 445. 2. (1897) 1 C. W. N. (Notes) 93.
3. (1837) 5 W. R. (P.C.) 34; 1 M. I. A. 363,

Rajamanarru v. Radhakrishnayya.

passed in each of them, although there may be a point common to all the suits, the decree in none of them would be regarded as satisfying the conditions of S. 110. It may be that where one common judgment is pronounced and no separate adjudication is necessary in the connected cases, the decision in the main case may be construed as involving a claim indirectly for the aggregate amount covered by all the cases. There is authority for this position, *Bymath* v. *Graham* [1]. The present case does not come within the principle of that case.

It may also be pointed out that the pronouncement which is complained of in our judgment only followed an earlier one by Subramania Aiyar, J. in *Chinnam Rajamannar* v. *Tadikonda Ramachandra Rao* [2] and that that decision was never sought to be appealed against.

For these reasons we are unable to grant the certificate. The petition is rejected. No order as to costs.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sadasiva Aiyar.

Nallasivan Pillai ... *Petitioner** (*Petitioner*)

v.

N. Ramalingam Pillai ... *Respondent* (*Counter Petitioner*)

Nallasivan Pillai v. Ramalingam Pillai.

Criminal Procedure Code, S. 476—Judicial proceedings—Legal Practitioners Act (18 *of* 1879 *S* 14—*Enquiry by District Judge into conduct of second grade pleader in connection with execution proceedings in a small cause suit—False statements in the course of such enquiry—Proceedings under S. 476, if can be started—Indian Penal Code, Ss.* 191 *and* 193—*Suggested amendment of—Government of India Act,* 1915 *S.* 107—*Powers of interference under.*

A District Judge taking evidence in a proceeding of which he is entitled to take cognizance under the Legal Practitioner's Act is a "court" and the enquiry is a "judicial proceeding" within the meaning of S. 476 of the Criminal Procedure Code.

Where a second grade pleader practising in courts subordinate to the District Court, is charged with unprofessional conduct in connection with proceedings in execution of a decree of a small cause court, it is beyond the jurisdiction of a District Judge to hold an enquiry under S. 14 of the Legal Practitioners Act into the conduct of the pleader. If in the course of such an enquiry by the District Judge, a witness is believed to have given false evidence, proceedings under S. 476 of the Criminal Procedure Code cannot be initiated against him.

Desirability of widening the scope of Ss. 191 and 193 of the Indian Penal Code, pointed out.

* C. R. P. No. 1111 of 1916. 23rd February, 1917.

1 (1885) I. L. R. 11 C. 749

2. (1905) I. L. R. 29 M. 155.

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It is only in very exceptional cases that the High Court will interfere, in the exercise of its powers under S. 107 of the Government of India Act or under S. 115 of the Code of Civil Procedure, with an order of the lower court passed under S. 476 of the Criminal Procedure Code.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act 1915 praying the High Court to revise the order dated 2nd September 1916 passed under S. 476 of the Code of Criminal Procedure by the District Court of Tinnevelly directing that the Petitioner in O. P. No. 391 of 1916 on its file be sent to the District Magistrate of Tinnevelly in order that he may be tried for an offence under S. 193 of the Indian Penal Code.

M. D. Devadoss for Petitioner.

E. R. Osborne, Public Prosecutor for Government.

Chidambaram Pillai and *Marthandam Pillai* for Respondent.

The Court delivered the following

Judgment:—The petitioner Nallasivan Pillai presented an application under S. 13 of the Legal Practitioners Act XVIII of 1879 against a Second Grade Pleader, Ramalingam Pillai, to the District Court of Tinnevelly on the ground that the said Vakil whom he had engaged to conduct an execution was guilty of improper conduct in the discharge of his professional duty in the matter of that execution.

Section 13 relates to the *power of the High Court* to suspend a pleader or Mukhtear and has clearly no application. Taking it that S. 13 is a mistake for S. 14 even then a charge of unprofessional conduct in the discharge of professional duty made against a pleader can be enquired into only by the presiding officer of the Court in which the pleader practises. The second Grade pleader, Ramalingam Pillai, having no right to practice in the District Court and the execution matter in which the alleged misconduct took place relating to a decree of the Tinnevelly Sub Court on its Small Cause side, the charge should not have been made to the District Court and could not be taken congnizance of or enquired into by the District Judge.

The District Judge, however, overlooked this point went elaborately into the matter, examined the petitioner Nallasivan Pillai on solemn affirmation as petitioner's witness, found his allegations against the Vakil to be wholly false and dismissed the petition on the 2nd September 1916. It goes without saying that the learned District Judge quite honestly believed himself to have jurisdiction to make that enquiry, neither the petitioner,

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Nallasivan Pillai, nor the second Grade Pleader, Ramalingam Pillai, (who was represented in the enquiry by another Vakil Arumugam Pillai) having evidently brought to the notice of the District Judge that the District Judge had no jurisdiction to make such enquiry.

On that same date, 2nd September 1916, the learned District Judge sent the petitioner, Nallasivan Pillai, under S. 476, Criminal Procedure Code to the nearest 1st Class Magistrate in order that he might be tried for offence under S. 193, Indian Penal Code in that the petitioner made false statements as his own witness in the enquiry held under the Legal Practitioners Act in the matter of a receipt Ex. I and in two or three other matters.

Against this order under S. 476, Criminal Procedure Code, the present Civil Revision Petition has been filed and the petition contains 6 grounds. The last two of the six grounds relate to the merits. I need not say that this court will interfere under S. 115, Civil Procedure Code or under S. 107 of the Government of India Act, 1915, with an order passed under S. 476 of the Criminal Procedure Code by a Lower Court only in very exceptional cases. The other four grounds of the Revision Petition raised the two following points: (1) the enquiry under the Legal Practitioners Act by the District Judge is not a judicial proceeding, (2) it was not, in this matter, a court within the meaning of S. 476, Criminal Procedure Code. It will be seen that neither of these points expressly raises the contention that the District Judge had no jurisdiction under the Legal Practitioners Act to conduct the enquiry which he did. An enquiry under the Legal Practitioners Act by a court is, in my opinion, a judicial proceeding. (See *Kotha Subba Chetty* v. *Queen* [1]). The expression "judicial proceeding" is not directly defined in the Indian Penal Code. Explanation 2 to S. 193, Indian Penal Code, however, makes it clear that a "proceeding before a court of justice" acting in the administration of justice is a judicial proceeding. The Criminal Procedure Code, S. 4 Cl. (m) defines "judicial proceeding" as *including* any proceeding in the course of which evidence may be legally taken on "oath" (which includes "solemn affirmation"). I cannot therefore accept the contention that a District Judge taking evidence in a proceeding

1. (1883) I. L. R. 6 M. 252.

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of which he is entitled to take cognizance under the Legal Practitioners Act is not "a court" or that the enquiry is not a "judicial proceeding."

I am of opinion therefore that the grounds mentioned in the memorandum of Civil Revision Petition have not been established as valid. But Mr. Deva Doss argued that as the District Judge had no jurisdiction to entertain the petition or to enquire into it, the whole enquiry was *ultra vires*, and, for false statements made in such an enquiry by the petitioner as a witness, he cannot be punished under S. 193, Indian Penal Code as the petitioner was not *legally bound* (see S. 191, Indian Penal Code) to state the truth before the District Judge in that enquiry and as the proceeding before the District Judge was not a "judicial proceeding" within the first paragraph of S. 193. This latter contention, however, cannot wholly absolve the petitioner from punishment as the giving of false evidence, though it was not done in a judicial proceeding is also punishable under the second paragraph of S. 193, Indian Penal Code. However, proceedings under S. 476, Criminal Procedure Code can be taken only where the offence is committed or is brought to the notice of the Court in a "judicial proceeding."

It is, no doubt, a very startling proposition that though every body is morally bound to state the truth, he may not in certain cases be legally bound to state the truth even after an oath or solemn affirmation has been administered to him by a court which honestly believes itself to have jurisdiction to conduct certain proceedings in which that man is a witness and when the person giving evidence (or for whom the evidence is given, if he is not the person giving evidence) has not objected to the jurisdiction of the Court to take the evidence.

It has been held that where a court had no power to put a particular person upon oath, (say an accused person) he was not legally bound by the oath and therefore cannot be punished for giving false evidence. This seems clearly equitable (see *Kotha Subba Chetty* v. *Queen*, [1] and *Queen Empress* v. *Subbayya* [2]).

It was held in *Queen Empress* v. *Bharma*, [3] that where the court had no power *to enter upon an enquiry* at all, the proceedings in that enquiry are not judicial proceedings and a

1. (1883) I. L. R. 6 M. 252. 2. (1889) I. L. R. 12 M 451.
3. (1886) I. L. R. 11 B. 702 (F. B.)

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witness in that enquiry, though solemnly affirmed, was not legally bound to state the truth. The same view was taken in 1891 by Muthusami Aiyar, J. in the case reported in 1 weir 151. (See also *Queen Empress* v. *Hanumantha Reddi,* [1] and *Emperor* v. *Abdul Rahiman* [2]). I might be permitted to express my regret that the highly technical view that a person is not legally bound to state the truth before a court of justice which has bound him by an oath or solemn affirmation when that court of justice had no jurisdiction to enter upon the enquiry though it honestly believed itself to have such power and though no objection had been taken to its jurisdiction has been adopted by the Indian High Courts following the English Cases on this point. See *The Queen* v. *Pearce* [3] where Cockburn, C. J., says when quashing the conviction for perjury "I regret that a man who has been convicted upon the merits, should escape from punishment upon a technical point of this sort, but we administer the law according to the established rules." I might be further permitted to express a hope that an explanation may be added to Ss. 191 and 193, Indian Penal Code to the effect that a person is legally bound in a court of justice as witness in any enquiry to state the truth and that such an enquiry is one in a judicial proceeding even if the court had no jurisdiction to enter upon the enquiry, provided (1) that the enquiry was not into an offence alleged to have been committed by the witness, (2) that the Court honestly believed that it had jurisdiction and (3) that an objection (to the inquiry or to the examination of the witness therein) on the ground of jurisdiction had not been brought to the notice of the court before the evidence was taken.

In the result, I feel myself bound to set aside the proceedings under S. 476, Criminal Procedure Code owing to the District Judge's want of jurisdiction to enter upon the enquiry under the Legal Practitioners Act.

A. V. V.

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1. (1899) I. L. R. 23 M. 223. 2. (1909) I. L. R. 32 A. 30.
3. (1833) 32 L. J. (N. S.) (M. C.) p. 75.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir John Wallis, Chief Justice and Mr. Justice Seshagiri Aiyar.

Arunachella Ambalam and others ... *Appellants* * (*Defendants Nos. 10, 13, 24, 26, 27, 29, 30, 31, 33, 35, 36, 38, 94, 96, 100, 101, 106 and L. Rs. of the deceased Defts. Nos. 28, 34, 37 and 95 and L. Rs. of the deceased 14th defendant*).

v.

R. G. Orr and others ... *Respondents* (*Plaintiffs and defendants Nos, 40 to 53, 55, 57 to 71, 74 to 79, 82 to 92*).

Landlord and Tenant—Waste or jungle land in Zemindari—Kudivaram rights—Ryots if entitled to—Limitation Act (*of* 1877) *S.*22—*Scope of—Assignee* pendente lite—*Civil Procedure Code* (*of* 1882) *S.* 372.

With regard to waste or jungle lands in a Zemindari the presumption is that the Zemindar owns the kudivaram rights also and the onus of proving the contrary is on the ryots.

Arunachella Ambalam *v.* R. G. Orr

S. 22 of the Limitation Act of 1877, applies only where a plaintiff is added or substituted with a view to litigate a right for himself independently of the rights of the original plaintiff and not to cases where a suit properly instituted is allowed to be continued by an assignee *pendente lite* of the rights of the original plaintiffs, under S. 372 of the Code of Civil Procedure, 1882. †

Abdul Rahman v. *Amir Ali* [1] Dissented from.

Ram Charan v. *Biswa Nath* [2]; *Chunni Lal* v. *Abdul Alikhan* [3] Referred to.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Madura in O. S. No. 2 of 1908.

T. R. Ramachandra Aiyar, C. S. Venkatachariar and T. M. Krishnaswami Aiyar for Appellants.

T. Rangachariar, for Respondents.

The Court delivered the following

Wallis, C. J.

Judgments:—*The Chief Justice*:—We have already given judgment as to the boundary question which arose between the villages of Karakudi and Sekkalakottai and have now to deal with so much of the appeals as relates to the claim of the Kottaiyur ryots to the Kudivaram rights in the Sekkalakottai village in which, we have decided, the suit lands are situated.

It is admitted that the suit village is one of the villages of the Sivaganga Zamindari, and, as such, the Zamindar is entitled

[† Note. In a case decided by the Privy Council under S. 22 of the Straits Settlements Limitation Ordinance which corresponds to S. 22 of the Indian Limitation Act, the same view has been taken. See *Meyyappa Chetty* v. *Subramaniam Chetty* (1916) 43 I. A. 113=20 C. W. N. 833. Rep.]

* A. S. No. 77 of 1909, 4th December 1914.

1. (1907) I. L. R. 34 C. 612.
2. (1914) 20 C. L. J. 107, 109.
3. (1901) I. L. R. 23 A. 331.

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to the melwaram rights in the village and it is not now suggested that he has been dispossessed of these melwaram rights. It is said, however, that the onus is on him to show that he was in possession of the Kudivaram rights within 12 years of suit. Now, as will abundantly appear from the Exhibits to which it will be necessary to refer, the suit land was waste land or jungle and mostly forest; and with regard to land of this character in a Zamindari the presumption is that the Zamindar owns the Kudivaram as well as the melwaram rights, and therefore, the onus is on the ryots of the village to show, if they can, that the Kudivaram right is vested in them.

[Then His Lordship proceeds to discuss the evidence on the point.]

But we are satisfied that the possession both of the melwaram and the Kudivaram rights of what was originally jungle land was originally in the Zamindar. We are not satisfied that he was ever effectively dispossessed of them by the Kottaiyur ryots although they no doubt made claims to the Kudivaram from time to time.

In the result we agree with the conclusion of the Subordinate Judge and dismiss this appeal with costs.

As regards the question raised by Mr. T. Ranagachariar that the 5th plaintiff to whom an assignment was made by the other plaintiffs in the course of this suit, that he ought to have been given a decree. I am unable to accept the respondent's contention that the suit though instituted in time is barred under S. 22 of the Limitation Act. As against the 5th plaintiff the assignee from the other plaintiffs of their cause of action who was allowed to continue the suit under S. 372, C. P. C., because the period of twelve years had expired, when he was brought on record. The Limitation Act deals with the institution of suits and S. 22 should, in my opinion, be confined to cases in which the new plaintiff is added or substituted in his own right so that he may be considered to be instituting a suit, and not to cases in which a suit, properly instituted is allowed to be continued by an assignee under S. 372, C. P. C. That section was not like S. 32 made subject to the provisions of the Limitation Act. To hold it to be so subject, is in my opinion to defeat its object and bring about the undesirable situation which it was enacted to avoid. Both sections must be read consistently if possible and I think S. 22 may perfectly receive the restricted construction I have

mentioned. The authorities in this court which will be referred to by my learned brother do not preclude us from so holding.

As regards the memorandum of objections the Subordinate Judge has found that the Zamindar and his lessees are not entitled to recover possession of the buildings on the suit lands without compensation on the ground that they encouraged the owners to build there. As I have mentioned already, the effect of the evidence is that in 1891 objection was taken when those who claimed under Ulagappa Chetty's grant built the buildings but they were not further interfered with. In these circumstances we are not prepared to differ from the conclusion at which the Subordinate Judge has arrived.

For the reasons given the decree will be amended by giving the 5th plaintiff a decree and otherwise the appeal will be dismissed with costs. The memorandum of objections will be dismissed without costs.

Seshagiri Aiyar.—I agree that the appeal should be dismissed. I would add a few words on the question of law argued by Mr. T. Rangachariar.

He asks us under Order 41, Rule 33 of the Code of Civil Procedure to amend the decree of the Subordinate Judge by giving a decree to the 5th plaintiff for possession along with plaintiffs Nos. 1 to 4. Plaintiffs Nos. 1 to 4 assigned their rights to the 5th plaintiff in June 1908, when the suit was pending. The decree was passed in December 1908; and as the new Limitation Act of 1908 came into force only in January 1909, this question has to be decided under the Act of 1877. Mr. C. S. Venkatachariar contends that under S. 22 of that Act, the claim of the 5th plaintiff was barred by limitation, as he was added as plaintiff in the suit more than 12 years after the accrual of the cause of action in 1893. The language of the section on the face of it covers all cases of addition and substitution of parties. But as contended by Mr. T. Rangachariar the proviso to the section shows the classes of cases contemplated by it. I think he is right in his contention that the section should be restricted only to cases where the substituted or added plaintiff asks that his own right should be adjudicated upon in the suit. And the section would apply also to cases where the original plaintiffs were not entitled to all the reliefs claimed in the plaint in their own rights. This view is strengthened by the amendment of the Act which places the assignee in the same position as the legal representative of the plaintiff. To hold otherwise would be practically to ignore

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S. 372 of the old Code of Civil Procedure. That section enables the court to permit an assignee of the rights of the original plaintiff to continue the suit. It would be anomalous to hold that the assignee who has the right to continue the litigation is not entitled to obtain a decree in his favour. I am of opinion that section 22 of the Limitation Act applies only to cases where the added or substituted plaintiff wants to litigate a right for himself independently of the rights of the original plaintiff. Mr. C. S. Venkatachariar relied very strongly upon the Full Bench decision of the Calcutta High Court in *Abdul Rahman* v. *Amir Ali* [1]. In that case the referring Judges and Mr. Justice Harrington were of opinion that the bar of section 22 will apply only to the substitution of a plaintiff and not to the addition; and the only question referred for the opinion of the Full Bench was whether a case of substitution came within the mischief of S. 22. I am unable to see how the case of addition can stand on a different footing from that of substitution. I must respectfully dissent from the Full Bench ruling in so far as it lays down that where a new plaintiff is substituted under Section 372 he will be affected by a period of limitation different from that which is applicable to the original plaintiffs. The view of the learned Judges in *Rai Churn* v. *Biswa Nath* [2] lends support to the view I have taken. Mr. Justice Wilson in *Subodini Debi* v. *Cumar Ganoda Kant Roy Bahadur* [3] came to the same conclusion. *Chunni Lal* v. *Abdul Ali Khan* [4] is another authority for the same position. The decision in *Fatmabai* v. *Pirbhai Virji* [5] is not opposed to this view. Mr. Justice Miller in *Subbaraya Aiyar* v. *Vaithinatha Aiyar* [6], expresses a doubt regarding the correctness of the view taken by Mr. Justice Wilson in *Subodini Debi* v. *Cumar Ganoda Kant Roy Bahadur* [3], Mr. Justice Sankaran Nair who took part in that case apparently does not share this doubt. On principle, I am of opinion the right view is to hold that where a plaintiff is added in consequence of the assignments of rights from the original plaintiffs, his right to a decree is not affected by S. 22 of the Limitation Act. The decree should be amended by giving the 5th plaintiff a decree for possession along with plaintiffs Nos. 1 to 4.

A. V. V.

1. (1907) I. L. R. 34 C. 612.
2. (1914) 20 C. L. J. 107 at 109.
3. (1887) I. L. R. 14 C. 400.
4. (1901) I. L. R. 23 A. 331.
5. (1897) I. L. R. 21 B. 580.
6. (1909) I. L. R. 33 M. 115.

IN THE HIGH COURT OF JUDICATURE AT MADRAS. [FULL BENCH.]

Present :—Mr. Abdur Rahim, *Officiating Chief Justice*, Mr. Justice Seshagiri Aiyar, and Mr. Justice Phillips.

The Secretary of State for India in Council ... *Appellant** (*Defendant*)

v.

C. A. Mahadeva Sastrial ... *Respondent* (*Plaintiff*).

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Madras Irrigation Cess Act, (Madras Act VII of 1865) S. 1 (b)—Certificate as to the beneficial nature and sufficiency of the irrigation to the crops—Necessity of—Duty on the Revenue officer to satisfy himself only of an executive and not a judicial nature—"Irrigation by percolation," whether covers cases, where subsoil water is taken to the roots of trees—The proper authorities to decide whether a land is irrigated from a Government source and whether it is chargeable.

It is not obligatory on the Collector to certify himself under S. 1 (b) Act VII of 1865 that the irrigation is beneficial. The duty imposed on the Collector to satisfy himself that the irrigation in any particular case is beneficial to the land is not of a judicial character liable to be reviewed by a Civil Court.

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"Irrigation by percolation" within S. 1 (b) of Madras Act VII of 1865, is not confined to irrigation by means of water flowing on the surface of the land irrigated, but covers also cases where subsoil water is taken up by the roots of trees.

Per *Abdur Rahim*, Offg. C.J. (*Phillips*, J. dissenting): Whether a particular land is irrigated by water derived from a Government source is a question of fact to be tried by the Court and is not left to the opinion of the Revenue authorities

Second Appeal against the decree of the Court of the Subordinate Judge of Mayavaram in Appeal Suit No. 181 of 1912, preferred against the decree of the Court of the District Munsif of Mayavaram in Original Suit No. 50 of 1910.

The Acting Government Pleader (Nugent Grant) for Appellant.

T. R. Venkatarama Sastri and *C. Aiyasami Sastri* for Respondent.

The Court (Seshagiri Aiyar and Kumaraswami Sastri, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH :—

This is a suit for the refund of the water-tax levied by the defendant. The District Munsif found that the plaintiff's plantain garden was irrigated by percolation by the water flowing in defendant's channel. The Subordinate Judge seems to hold

*S. A. No. 945 of 1914. 7th August. 1916.

1. (1911) I. L. R. 34 M. 21. 2. (1912) I. L. R. 35 M. 197.

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that the plantain trees at or near the bund of the defendant's channel had their water-supply from the defendant's channel, but not the others. Without discriminating between those that are liable to be taxed and those that are not, he held that as the Collector did not certify that the plaintiff was benefited by the percolation, the levying of the tax was illegal. It was held in *Secretary of State for India* v. *Swami Naratheeswarar* [1] that the institution of a suit by the Collector was tantamount to certifying that in his opinion the irrigation was beneficial. The learned Government Pleader contends that the filing of the written statement must be placed on the same footing. The discretion given to the Collector is a judicial one. It has the effect of taking away from the cognizance of the Court, the right to determine a very important question which would arise in suits calling in question the act of the Government under Act VII of 1865. The mind of the Collector must have been applied to the point before the tax is levied. The observations of Sankaran Nair, J., in *Raja Ramachandra Appa Row* v. *Secretary of State for India* [2] support this view. In second appeals Nos. 668 and 672 of 1911 with reference to a similar power under Act II of 1894, the learned Judges say "It is difficult to hold that any act of Government which may be unauthorised without a declaration under Act II of 1894 can itself be held to amount to such a declaration." We are in agreement with this view. The learned Government Pleader contends that the certificate of the Revenue Inspector, initialled by the Deputy Collector, satisfies the requirement of the section. We are unable to accept this contention. The word Collector cannot include the Revenue Inspector. The discretion was properly vested in a superior officer as it was intended to take away from the Civil Courts the jurisdiction to determine whether the taxed party was benefited by the irrigation.

The other question which the learned vakil for the respondent pressed before us relates to the meaning of the term 'irrigates by percolation'. It was contended that capillary attraction of water is not irrigation. The District Munsif has written a learned judgment on this question. Having regard to the importance of the issues involved, we think it necessary to refer for the decision of a Full Bench the following questions :

1. (1911) I. L. R. 34 M. 21. 2. (1912) I. L. R. 35 M. 197 at p. 206.

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1. Whether it is obligatory on the Collector to certify himself under section (1) (b) of Act VII of 1865 that the irrigation is beneficial ?

2. Whether he can delegate this authority to a subordinate official ?

3. Whether the fact that the Collector has sanctioned legal proceedings and has defended a suit in respect of the tax is a sufficient compliance with the provision of section I (b) ?

4. Whether the words "irrigation by percolation" cover cases where subsoil water is taken by the roots of trees ?

[The second appeal came on for hearing on Friday the 21st July 1916.]

The Acting Government Pleader (*V. Ramesam*) for appellan :— The section which has to be construed is S. 1 (*b*) of Madras Act VII of 1865. The word "opinion" of the Collector in S. 1 (*b*) does not mean a declaration or certifying which has always reference to another person ; but the formation of an opinion in his own mind. It is not a judicial but only an executive act. In S. A. No. 668 and 673 of 1912. Sundara Aiyar and Sadasiva Aiyar, JJ., dealt with Ss. 17 to 19 of the Madras Proprietary Estates Act (Madras Act II of 1894) where the term used is "notified" and they held it could not be an imposition of the cess itself. *Secretary of State for India* v. *Swami Naratheeswarar* [1] supports my contention under the Irrigation Cess Act. The imposition of the cess itself is the expression of the Revenue Officer's opinion within the meaning of this Act. The means of forming his opinion or whether he keeps it to himself or whether he records it or communicates to others, makes no difference under the Act. *Secretary of State for India* v. *Swami Naratheeswarar* [1] has been followed in *Secretary of State for India* v. *Ambalavana Pandara Sannadhi* [2]. *In Raja Ramachandra Appa Row* v. *Secretary of State for India* [3], Mr. Justice Sankaran Nair has held that the opinion may be formed by personal inspection and hence it follows that it need not be based on judicial inquiry.

As for the 'irrigation by percolation', trees and plants can only suck water which comes in contact with their roots. So percolation does not differ from direct irrigation by being placed

1. (1911) I. L. R. 34 M. 21=20 M. L J. 766.

2. (1910) I. L. R. 34 M. 366. 3. (1911) I. L. R. 35 M. 197.

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near the stream. Both means of irrigation take only to the roots. Irrigation in S. 1 (b) of the Act is used in the wider sense of "watering" or "moistening" and not in the sense of visible supply of water by means of channels and streams.

T. R. Venkatarama Sastri (with him *C. Aiyasami Sastri*) for the Respondent:—The statute lays down a limitation on the imposition of a tax and the construction of the Act contended for on the other side would lead to the Collector imposing a tax in every case. The Collector should have applied a judicial mind to the case. This is clearly brought out when read by the side of the older Act which merely says "it may be open to the Collector to impose a tax". In this case only the Deputy Collector's signature is found in the papers.

The word 'irrigates' has not been defined in the Act. "Irrigate" only refers to the flowing of water on the land. For the meaning of "Irrigation" see Murray's Oxford Dictionary and Webster's International Dictionary under the heading 'Agriculture.' Irrigation by percolation in the section has only reference to water oozing out and flowing visibly on the surface of the land irrigated. It does not apply to mere subsoil irrigation. The argument of the other side will lead to every garden (not in Zamindari) being taxed because it will take water from one Government source or another by percolation through subsoil. The act uses the term "irrigates land" and not irrigates the plants or trees because all plants and trees only take water by the roots which will not be visible.

[*The Offg. C. J.*—Irrigation according to you does not mean saturation of the subsoil but distribution by defined channels whether under ground or above.] According to the contention of the other side irrigation from wells would be taxable. Yet this is not the policy of the Act. Reference was made to The Land Revenue Policy of Government, p. 223, Board's Standing Order No. 6, para. 3.

The Government Pleader in reply.

The general meaning of the word "irrigation" in the Oxford Dictionary is "to supply with moisture, to moisten, wet." That is the sense in which the term is used in the Act. Lord Curzon's Land Revenue Policy, p. 223 and Board's Standing Orders clearly show that though percolation from wells is liable to tax under the Act yet as a matter of executive policy and with a view to encourage

sinking of wells, the Government have exempted well-water from taxation. The argument based on the unfettered discretion of the Revenue authorities is illusory. For percolation is really confined to a cone whose radius is twice the height of the water surface. See Manual of Sanitary Science published by the Madras Government.

The Court expressed the following

Opinion :—*The Officiating Chief Justice.*—The answer to the questions asked in the Order of Reference depends on the interpretation of section 1 of the Madras Irrigation Cess Act VII of 1865. That section is as follows: (*a*) "Whenever water is supplied or used for purposes of irrigation from any river, stream, channel, tank or work belonging to, or constructed by, Government and also (*b*) whenever water by direct or indirect flow or by percolation or drainage from any such river, stream, channel, tank or work from or through adjoining land irrigates any land under cultivation or flows into a reservoir and is thereafter used for irrigating any land under cultivation, and, in the opinion of the Collector, subject to the control of the Board of Revenue and of the Government, such irrigation is beneficial to, and sufficient for the requirements of, the crop on such land it shall be lawful for the Government to levy at pleasure on the land so irrigated a separate cess." The preamble says "Whereas, in several districts of the Madras Presidency, large expenditure out of Government funds has been and is still being incurred in the construction and improvement of works of irrigation and drainage, to the great advantage of the country and of proprietors and tenants of land; and whereas it is right and proper that a fit return should, in all cases alike, be made to Government on account of the increased profits derivable from lands irrigated by such works; it is enacted as follows". It will be observed that the Madras Legislature bases the right of the Government to levy an irrigation cess, on account of the expenses incurred by the Government in the construction and improvement of works of irrigation and drainage, and on the benefit derived by the holders of agricultural land from such sources. But in the enactment itself, it confers on the Government the right to levy irrigation-cess even in cases where the particular source of irrigation is a natural river or stream and no expenses need have been incurred by the Government in the construction of any irrigation works in connection with them. It

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therefore goes farther than is justified by the policy as expounded in the Act itself. However that may be, we are concerned with the construction of the enacting words of the statute and are bound to give effect to them. The first question asked in the Order of Reference must be answered in the negative in the sense that the duty imposed on the Collector to satisfy himself that the irrigation with respect to which cess is levied is beneficial to and sufficient for the requirements of the crop on such land is not of a judicial character liable to be reviewed by Courts of Justice. The act nowhere says that the Revenue Officer is to certify in writing that the irrigation in question is beneficial. His opinion is made subject to the control of the Collector, the Board of Revenue and the Government and not of the Courts of Justice. The duty to be performed by the Revenue Officer seems to be of an executive nature, liable to be supervised only by the higher Revenue authorities and the Government. I find nothing in the Act to justify the Court in saying that because the Collector or any other Revenue officer entrusted with power in this respect has not recorded his opinion in the form of a certificate or otherwise, therefore the imposition of cess is illegal and liable to be set aside. This is the view taken in a recent decision of this Court, *Secretary of State for India* v. *Swami Naratheeswarar*, [1] and I have no doubt it is correct. The answer to the first question being in the negative, the second and third questions do not arise.

The fourth question "Whether the words 'irrigation by percolation' cover cases where subsoil water derived by percolation from a river or channel owned by the Government is taken by the roots of trees" is one of some importance. It must be admitted that the words used in S. 1 are of an extremely wide and comprehensive nature. It is contended however that the word "irrigation" in clause (b) (which is the clause applicable to this case) refers to cases where water from a river or channel owned by the Government actually comes upon the surface of the land upon which cess is sought to be levied whether by flow, direct or indirect, or by percolation. But the words used are "whenever water.......... ....by percolation.................. irrigates any land" and not whenever land is irrigated by means of water derived from a river or channel owned by the Government. Here the word "irrigates" seems to be used in the wider

1. (1911) I. L. R. 34 M. 21 at p. 24.

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sense of 'waters', 'moistens' and not in the special sense of supplying (land) with water by means of channels or streams passing through it. It is strongly urged upon us by Mr. T. R. Venkatarama Sastriar who appeared for the appellant that such an interpretation will lead to great hardships, as it would enable the Revenue authorities to levy water-cess at their uncontrolled discretion on land, situated at a considerable distance from a Government river or stream. But the discretion of Revenue authorities is not quite so unfettered as is apprehended. Whether particular land is irrigated by water derived from a Government source or not is a question of fact which is to be tried by the Court and is not left to the opinion of the Revenue authorities. It is only when that is found, that the further question whether such irrigation is beneficial to, and sufficient for the requirement of the crop on that land, is left to the Revenue authorities to decide. It is also doubtful whether in ordinary cases, the water of a river or stream would extend by percolation to any great distance from the banks and the learned Government Pleader himself suggested that it would not extend farther than 50 feet or thereabouts. Besides the Board of Revenue by their Standing Order No. 6, page 8 have exempted private wells from taxation although they might derive water from a Government source. The answer to the fourth question must be in the affirmative.

Seshagiri Aiyar, J.

Seshagiri Aiyar, J.:—In this case I have had the advantage of reading the judgment which my learned brother, Philips, J. has prepared. I am in general agreement with the conclusions at which he has arrived; but having regard to the fact that I was one of the Judges who referred the questions to a Full Bench as requiring definite pronouncements, I desire to say a few words.

I agree in thinking that in forming the opinion referred to in section 1 (*b*) the Collector is acting in his executive capacity and not judicially. It is true that the conclusion he has to come is binding on the parties and on the civil courts. Consequently, it is necessary that he should have before him all the materials, should himself examine those materials and if possible give an opportunity to the party likely to be affected to make his representations. But it is not obligatory on him to act judicially. I feel no doubt that as the opinion he is required to form will have far-reaching consequences, the Collector may be expected

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to give his best attention to the subject. The learned Government Pleader has satisfied me by contrasting the language used in this Act with that used in other Acts which impose the duty of acting judicially on executive officers, that in the present instance no question of certifying by the Collector is contemplated. I therefore agree in answering the first question in the negative. The second and third questions do not arise for consideration, in this view.

On the fourth question, I felt doubts in the course of the argument whether the expression "irrigation by percolation" can be applied correctly to underground watering. The definition of *irrigation* to which Mr. Venkatarama Sastriar drew our attention in his able argument seems to imply that there must be something visible and connective between the channel water and the field which is said to have been irrigated. At the same time, it has to be conceded that the language of the Act and the policy of the legislature in departing from the earlier decisions, as pointed out in *Secretary of State for India* v. *Swami Naratheeswarar,* [1] show that the Act is intended to apply to all cases wherein the crop is nourished by percolation. It is not for us to say whether the legislature should have enacted a rule of this kind. We have to deal with the sections as we find them. A few other considerations have influenced me in accepting this view which was strenuously pressed upon us by the learned Government Pleader. One is that percolation as understood in scientific text-books cannot ordinarily reach a soil which is beyond 50 feet from the source of the water. See the Manual of Sanitary Science published by the Government. The second is the concession of the Government Pleader that wells etc., which derive their supply from springs (whether these springs are traceable to Government sources or not) would not be regarded as containing water coming by direct or indirect flow by percolation. This latter position derives strength from the Resolution of the Government of India passed with reference to attacks on the Government policy regarding land assessment. See page 225. The Standing Orders of the Board of Revenue, Order VI, in terms exempt private wells from the category of water sources which can be said to have derived their supply by percolation.

1. (1911) I. L. R. 34 M. 21.

The practical result of these exemptions will be to affect only a small extent of land, namely, those which are on the immediate neighbourhood of running streams and the crops on which are patently nourished by the water flowing in the stream. I therefore agree with my learned colleague in answering question No. 4in the affirmative.

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Phillips, J.—The first question that has been referred to us must, I think, be answered in the negative. Section (1) (b) of Act VII of 1865 makes no provision for any certificate being furnished by the Collector, but says "whenever...in the opinion of the Collector, subject to the control of the Board of Revenue and of the Government, such irrigation is beneficial to, and sufficient for the requirements of, the crop on such land, it shall be lawful for the Government to levy at pleasure on the land so irrigated a separate cess." The only necessity here imposed is that the Collector shall be of opinion that the irrigation is beneficial, and it has been observed both in *Secretary of State for India* v. *Swami Naratheeswarar* [1] and in *Secretary of State for India* v.*Ambalavana Pandara Sannadhi*[2] as follows: "the question as to the beneficial character of the water taken from the Government source and of its sufficiency are not for the Civil Court, but for the Collector subject to the control of the Board of Revenue and of the Government. The Collector in this case having imposed the assessment and he not having been overruled by the higher revenue authorities, we think the plaintiff is clearly liable to pay the assessment". Also in *Raja Ramachandra Appa Row* v. *Secretary of State for India* [3]. Sankaran Nair, J in his judgment appears to be of the same opinion. He says that section 1 (b) provides that the Collector has to satisfy himself that the irrigation is beneficial to the requirements of the crop and that this can only be properly done when the crop is on the land, and it appears that it was not contemplated that the Collector has to decide this question by taking evidence after the harvest is over. I think, therefore, that the learned Judges who referred this question are not right in saying that the discretion given to the Collector under the section is a judicial one. It is immaterial on what grounds he forms his opinion so long as he satisfies himself in any way that he thinks best, that the irrigation is beneficial.

Phillips, J.

1. (1911) I. L. R. 34 M. 21. 2. (1911) I. L. R. 34 M. 366.
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If that is so, no certificate is required under the Act, and therefore the question must be answered in the negative. In this view, it is unnecessary to consider questions 2 and 3.

The fourth question whether the words "irrigation by percolation" cover cases where subsoil water is taken by the roots of trees, has been argued at some length, and the learned vakil for the respondent urges that irrigation by percolation cannot mean irrigation by water which reaches the ground irrigated beneath the surface of the soil. However, turning to the definition of these two words in the dictionary, for they are not defined in the Act, we find 'irrigate' defined as follows : to supply with moisture, to moisten wet. A special meaning is given (*i.e.*) (1) to supply land with water by means of channels or streams passing through it, (2) to water. It is contended that, here, we must apply the first of these two special meanings and that, unless channels or streams pass through the land, there is no irrigation. The definitions in the various dictionaries are not always worded in exactly the same way and consequently cannot be applied too literally. We have the general definition under the special head, namely, "to water." If we take this latter meaning, which is after all the usual meaning of the word any means whereby land is watered, that is to say, has water supplied to it, must be irrigation. In the present case, the water percolates from a Government source, and as 'percolation' itself means "passing through a porous substance or medium, or filtering, oozing, or trickling through" as defined in the Oxford New English Dictionary, we must take it that irrigation by percolation is equivalent to watering by means of water which oozes through the subsoil and passes to the land to be irrigated. There is nothing in this definition which supports the learned vakil's contention that irrigation cannot be effected unless the water which irrigates comes on the surface of the land. To show that this cannot be correct, it is only necessary to state that when water passes into the subsoil, a certain portion of it must come to the surface of the soil owing to the process of evaporation, and whether it comes to the surface at the last stage, or whether it starts on the surface and gradually filters through the subsoil is quite immaterial. The reason for putting forward this argument is apparently, because, if we adopt the view that percolation through the subsoil is irrigation, any water

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which passes to the subsoil or to wells on lands would be liable to be charged under S. (1) (b). Whether it can be so charged or not is not a matter which need be decided now, but it may be observed that all the water which comes into a well owing apparently to rainfall or floods in an adjacent river or stream does not necessarily come by means of percolation from a Government source of irrigation. It must depend on the distance at which the well is situated from the source of irrigation. The water in the source can only percolate to a certain distance, and beyond that the supply probably comes from subterranean springs or underground channels of water, and this supply would, of course, depend on the nature of the strata below the surface of the soil. If we were to allow the contention that, in order to irrigate by percolation, the water must first come to the surface of the land, it would debar Government from charging assessment on what is most certainly water taken from a Government source. It is a question for the decision of revenue authorities in each case to decide whether any land is irrigated by percolation from a Government source, and if it is so irrigated, then it is chargeable under the Act. We have been referred to the Board's Standing Orders and a resolution of the Government of India regarding the levy of water-cess to show that it was not the intention of the Government to charge cesses on all water which passes through the soil and benefits the adjoining lands, and it is suggested that this has been done because the Government realised that this water could not be taxed under the Act. It is not necessary I think, to draw this inference from these two orders. Another inference would be that, although the Government think that they have the right to tax such water, yet on grounds of public policy, they think it is advisable to order their officers to abstain from doing so. It is the policy of Government to encourage the sinking of wells, and therefore they have decided that, even though they might charge for the water taken into such wells on the ground that it percolates through to them from a Government source, not to make any charge for the same. As I have said, the whole question depends on the interpretation of the words "irrigation by percolation."

Another argument, I think, that may be addressed to the contention raised is that, if the percolation is merely through the

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bund of a Government source and then flows on the surface of the land, it might very easily be said to be irrigation by direct flow from that source, for, as soon as it leaves the limits of the Government irrigation work, it is a flow of water and then there would be no necessity for providing a condition, that irrigation by percolation is also liable. There is no doubt that water which percolates into the subsoil is as beneficial to the growth of plants as the water which is poured down into the subsoil from above, and there is no reason why the one should not be liable to tax rather than the other.

For these reasons, I am certainly of opinion that, where water percolates from a Government source into the subsoil of a neighbouring land, and is beneficial to such land it is chargeable under section (1) (*b*) of the Act. I would, therefore, answer this question in the affirmative.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

Present:—Sir John Wallis, Kt., Chief Justice, Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Aiyangar.

Doraisami Padayachi and another ... *Appellants** (*Plaintiffs*).

v.

Vaithilinga Padayachi (dead) and others. ... *Respondents* (*Defendants and the L. Rs. of the deceased 1st defendant.*)

Doraisami Padayachi v. Vaithilinga Padayachi.

Indian Contract Act (*IX of* 1872) *S.* 25—"*Debt*", *meaning of—Amount which might be found due on taking accounts, not a "debt"*.

A promise to pay the amount which might be found due by an arbitrator on taking accounts between the parties is not a promise to pay a "debt" within the meaning of S. 25 of the Contract Act.

The word "debt" in the section is used in its ordinary meaning of a sum payable in respect of a money demand recoverable by action.

Observations of Subramaniya Ayyar, J., in *Sabju Sahib* v. *Noordin Sahib* [1], referred to.

Second Appeal against the decree of the Subordinate Judge of Kumbakonam in A. S. No. 491 of 1913, preferred against the decree of the District Munsif of Shiyali, in O. S. No. 15 of 1912.

This case came on for hearing before (Seshagiri Aiyar and Phillips, JJ.) who passed the following

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* S. A. No. 1965 of 1914.

1. (1899) I. L. R. 22 M. 189.

ORDER OF REFERENCE TO A FULL BENCH.

F. B.
Doraisami Padayachi v. Vaithilinga Padayachi.

The plaintiffs and defendants are said to have been partners. The partnership is said to have come to an end in 1905. Disputes having arisen between the parties, the matter was referred to arbitration in January 1907. Nothing was done by the arbitrator till September 1910, when, according to the plaintiffs, the first defendant in the presence of the plaintiffs gave a statement to the arbitrator which is marked as Ex. A. The letter is in these terms:—"As my sons Govindan and Ponnan are not in the village to settle the accounts relating to the trade carried on by me and Sinan, I shall bring and produce the said two persons at Vilandidasamudram before to-morrow 10 o'clock, and I shall settle the said accounts. In default I shall pay the amount due as per account together with interest thereon at the rate of 3 pies per rupee per day." The arbitrator died in October 1910. The present suit was instituted in 1911. The plea of the defendants is that the suit is barred by limitation. Both the Courts below have upheld this plea and have dismissed the suit.

In second appeal, various points have been argued. It is not necessary to refer to all of them now. Mr. Kuppusami Aiyar contended that the letter above set forth creates a new contract, and that the cause of action for the suit arose only on the date of Ex. A. He relies on *Mrs. Simon* v. *Arogiasami Pillai* [1], in which the learned Judges held that an undertaking to pay whatever balance may be found due would amount to a promise to pay the debt. The decision in *Bollapragada Ramamurthy* v. *Thammana Gopayya* [2], quoted by Mr. Muthiah Mudaliar may possibly be distinguished from the present case. The learned Judges in that case construed the language of S. 19 of the Indian Limitation Act and held that an undertaking to pay whatever the arbitrator may decide to be due is not an unconditional undertaking so as to give a fresh period of limitation. It is open to argument that that decision holds that there should be an ascertained amount before a debt can be regarded as having been acknowledged. There are other decisions more in point. In *Sabju Sahib* v. *Noordin Sahib* [3] it was held that the word *debt* in the Succession Certificate Act is used in the ordinary sense and that in order that a debt may be predicated "the claim must be one about which there is certainty."

1. (1913) 16 M. L. T. 122. 2. (1916) 31 M. L. J. 241.
3. (1899) I. L. R. 22 M. 139.

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Doraisami Padayachi v. Vaithilinga Padayachi.

This is also the view taken in *Bisseswar Roy* v. *Durgadas Mehara* [1].

In this state of the authorities we think it desirable that the following question should be referred for the decision of a Full Bench:—

Whether the clause in the agreement already referred to "I shall pay the amount due as per account" is a promise to pay a debt satisfying the requirements of S. 25 of the Indian Contract Act?

We may point out that in our opinion the word "amount" in the above clause refers to the amount which may be found due by the arbitrator.

R. Kuppuswami Iyer for appellants :—The word "debt" means an obligation to pay money arising out of a contract.

Wallis, C. J.—And not, as damages. Debt always means an ascertained amount.]

"Debt" may also include an amount which can be ascertained and it is in this sense that the term is used in S. 25 of the Contract Act. Under the Succession Certificate Act only, the word "debt" has been held to include only ascertained debts. Reference was made to *Mrs. Simon* v. *Arogiasami Pillai*, [2] *Billings* v. *The Uncovenanted Service Bank* [3], *Sabju Sahib* v. *Noordin Sahib* [3].

S. Muthia Mudaliar for respondents was not called upon.

The Court expressed the following

Opinion :—Assuming as stated in the order of reference, that the meaning of the letter was that the writer promised to pay the amount which might be found due by the arbitrator on taking the accounts of the partnership, we are clearly of opinion that this was not a promise to pay a debt within the meaning of S. 25 of the Indian Contract Act. We think that the word "debt" used in this context must be taken to have been used in its ordinary meaning of a sum payable in respect of a money demand recoverable by action. See the observations of Subramania Aiyar, J. in *Sabju Sahib* v. *Noordin Sahib* [4]. We accordingly answer the question in the negative.

A. V. V.

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4. (1905) I. L. R. 32 C. 418.
2. (1918) 16 M. L. T. 122.
3. (1881) I L. R. 3 A. 781.
4. (1899) I. L. R. 22 M. 139.

PRIVY COUNCIL.

Present:—Lord Parker of Waddington, Lord Sumner, Sir John Edge and Sir Lawrence Jenkins.

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Mina Kumari Bibi ... *Appellant.* *

v.

Raja Bijoy Singh Dudhuria ... *Respondent.*

P. C.

Mina Kumari Bibi *v.* Raja Bijoy Singh Dudhuria.

Civil Procedure Code, 1882 (*Act* 14 *of* 1882), *Ss.* 274, 276 *and* 295—*Attachment in execution of a decree—Sale by judgment debtor of attached property—Subsequent attachment and sale of same property in execution of another decree—Rights of the private purchaser and the execution purchaser who held both decrees —Transfer of Property Act*, 1882, (*Act* 4 *of* 1882) *S.* 53—*Preferential payment to a creditor not fraudulent.*

The respondent, who was the transferee of two decrees dated 1896 and 1901 respectively, obtained in execution proceedings (Case No. 8 of 1902) in connection with the first decree, an order of attachment under S. 274 of the Code of Civil Procedure, 1882, of certain properties belonging to the judgment debtor, but by an order dated the 20th March 1905 sale of the attached properties was indefinitely postponed and on the 29th March 1905 the execution application was dismissed with the respondent's consent. On the 15th July 1907 the judgment-debtor conveyed the said properties to the appellant by two sale-deeds. On the 26th July 1907 the respondent made another application for execution (Case No. 19 of 1907) of the decree of 1896, and in spite of the judgment-debtor's opposition it was held that this application was in continuation of the former proceedings and that the properties were still under attachment.

On the 16th July 1907 the respondentapplied for execution (Case No. 16 of 1907) of the decree of 1901. In these proceedings the said properties were attached, and notwithstanding the Appellant's opposition they were sold in execution and purchased by the respondent-decree holder, who obtained possession thereof. The Appellant sued for recovery of possession of the same.

Held, that though the word 'attachment' occurred three times in S. 276 of the Code of Civil Procedure, 1882, the reference was to one, and only one attachment and that one in the present case was the attachment in case No. 16 of 1907, on which the respondent's title rested; that the sale to the appellaht being prior to the date of that attachment was not void; and that the Appellant's suit must be decreed:

Held, also, that all that the earlier attachment in Case No. 8 of 1902 could do was to entitle the decree-holder to the benefit of the later attachment in Case No. 16 of 1907 but he could not claim to be in a better position than the decree-holder in the latter case and his position is not strengthened by the fact that it was the same person who was the decree-holder in both cases.

A debtor, for all that is contained in S. 53 of the Transfer of Property A t 1882, may pay his debts in any order he pleases and prefer any creditor he chooses and even though a debtor has preferred a creditor of set purpose it would not stamp the transaction as fraudulent.

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* 11th December 1916.

P. C.

Mina Kumari Bibi v. Raja Bijoy Singh Dudhuria.

Appeal from a judgment and decree of the Calcutta High Court (Chitty and Teunon, JJ.) dated the 26th March, 1912 which reversed a judgment and decree of the Subordinate Judge of Murshidabad, District.

The main questions for determination on the Appeal were (1) whether the properties in dispute were owned by Chhatrapat Singh after the 15th July, 1907, or by the appellant in whose favour two conveyances were executed by the said Chhatrapat Singh on the 15th July, 1907, and (2) whether an auction sale at which the respondent purchased the properties was liable to be set aside. The facts which give rise to the litigation are fully stated in their Lordships' Judgment. The respondent held two decrees against Chhatrapat Singh, dated the 24th August 1896 and 3rd January 1901. The respondent took execution (Case No. 8 of 1902) of the first decree and the properties in dispute were attached and the writ of attachment was duly served on the 21st July, 1902. Certain persons then put forward claims to the attached properties and the claims were decided finally by the High Court on the 27th February 1907 and it was held that the judgment debtor Chhatrapat Singh was the owner of the properties. The respondent then proceeded to execute the second decree dated 3rd January 1901. He applied for execution (Case No. 16 of 1907) on the 16th July, 1907. On the 28th September, 1907 the Appellant Mina Kumari laid a claim to the attached properties urging that the properties had been sold to her by the judgment debtor on the 15th July, 1907. The District Judge rejected the claim and the properties were sold and purchased by the respondent and the sale was duly confirmed. The Appellant brought the present suit to recover possession of the properties. The Subordinate Judge found all the material issues in favour of the plaintiff. He found that the Judgment debtor owed a debt to the Plaintiff and that in payment of that debt the properties were sold to the plaintiff on the 15th July 1907 and that it was not proved that the properties were under attachment on the date of her purchase. He accordingly allowed the Plaintiff's claim. The High Court came to the opposite conclusion on the evidence. It held that the sale deeds were antedated after the attachment made in 1907 and that the judgment debtor continued to be the real owner of the properties and therefore dismissed the suit. Hence this appeal.

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Mina Kumari Bibi
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Upjhon, K. C., and Sir W. Garth for the Appellant submitted that the findings of the Trial Judge were right. The grounds on which the High Court based their judgment were not raised in the written statements nor in the issues and were not suggested in cross-examination to any of the plaintiff's witnesses. The evidence produced by the plaintiff established that the conveyances were in fact executed on the 15th July, 1907, and the case that they were ante-dated was not made by the defence before the trial Judge. The fraud pleaded by the defence was that the judgment-debtor did not owe any debt to the plaintiff, but that was proved against the defence and that finding was admitted to be correct. The High Court erroneously acted on a case which was never pleaded nor proved. The Respondent's case ought to have been put to the other side. *Bal Gangadhar Tilak* v. *Shriniwas* [1].

De Gruyther, K. C. and B. Dube for the respondent submitted that the sales to the plaintiff were collusive and fictitious and that there was evidence upon the record on which the High Court was justified in holding that the sale deeds had been ante-dated. Further the properties were under attachment since July 1902 and the attachment was subsisting on the 15th July, 1907.

(*Upjohn* contended that the point was not open to the respondent as it was not pressed by his Counsel before the High Court).

The point was raised in the written statement and the grounds of appeal to the High Court. An abandonment of a question of law by the legal advisers of a party would not preclude that party from arguing the point. Reference was made to the following *Maharani Beni Koeri* v. *Dudh Nath* [2].

(Their Lordships ruled that they would hear the point raised.)

Under S. 276 of the Code of Civil Procedure, 1882, the sales to the plaintiff were void against all claims enforceable under the attachment. The respondent's claim under the first decree dated the 24th August 1896 (Execution Case No. 8 of 1902) was enforceable under section 295 of the Code and therefore enforceable under S. 276. It was proved that the respondent had applied for rateable distribution of the proceeds of the sale. Reliance

1. (1915) L. R. 42 I. A. 135, 146= 2. (1899) L. R. 26 I. A. 216, 221.

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was placed on *Sorabji* v. *Govind Ramji* [3]. That was the correct interpretation of Sections 276 and 295 of the Code and is now embodied in the new Code of 1908, S. 64.

Upjohn K. C. in reply :—As to the point of law (their Lordships having intimated that they did not desire to hear Counsel for the Appellant on the facts) the attachment in S. 276 which has the effect of avoiding a private alienation of the property must be an attachment under which the respondent claims title. The attachment in the present case was admittedly made after the 16th July, 1907. S. 295 has no application. The attachment in case No. 8 of 1902 would be operative if the attachment in case No. 16 of 1907 were good and valid. The decree-holder in the earlier attachment could not be in a better position than the one in the later attachment. In any view the earlier execution and attachment had been abandoned long ago and the previous attachment ought not to be regarded as subsisting on the 15th July, 1907.

The judgment of their Lordships was delivered by

Sir Lawrence Jenkins.

Sir Lawrence Jenkins. This is a suit for the possession of immoveable property brought by a purchaser under a private alienation against a purchaser at an execution sale, who was also the decree-holder and against the judgment-debtor. There was also originally another defendant, but he has since died and is now represented by the decree-holder.

The suit was decided in the plaintiff's favour in the Court of the Subordinate Judge at Berhampur, but on appeal it wss dismissed with costs by the High Court of Calcutta. From the High Court's decree the present appeal has been preferred to His Majesty in Council.

The judgment-debtor is Chhatrapat Singh Dugar, who is not inexperienced in litigation. Two decrees were passed against him in the High Court of Calcultta on its original side, one on the 24th August, 1896, in suit 449 of 1896, the other on the 3rd January, 1901, in suit No. 302 of 1900. The defendant, Raja Bijoy Singh Dudhuria, the purchaser at the execution sale, was a transferee of both decrees and so became the decree-holder under each.

It will be convenient to trace briefly the history of these decrees, both of which were sent for execution to the Court of the District Judge of Murshidabad.

1. (1891) I. L. R. 16 Bom. 91, 95.

On the 13th June, 1902, an application was made at Murshidabad by the decree-holder, for execution of the decree of 1896, and the proceedings became execution case No. 8 of 1902.

On the 12th July, 1902, an order of attachment was made, under section 274, C.P.C., prohibiting the judgment debtor from alienating the property there specified until any other order should be passed by that Court.

The proceedings were protracted by adverse claims, but ultimately on the 29th March, 1905, the following order was recorded: "Nothing further can be done in this case at present. The application for execution is accordingly dismissed with the consent of the decree-holder. Certify result to the High Court, Original Side."

Though this does not appear on the record, it may be assumed that the Murshidabad Court certified the result to the High Court, in accordance with the provisions of the Code (Section 223).

On the 26th July, 1907, another application, No. 19 of 1907 was made to the Murshidabad Court for execution of the decree of 1896, and here, too, it may be assumed that an order was made by the High Court for the transmission of the decree. The order made on the application was, "Now issue warrant of attachment returnable on 16th August."

On the 29th July, 1907, at the decree-holder's instance, the issue of the warrant of attachment was stayed, and a direction given for the issue of notice to the judgment-debtor to show cause, on the 16th August, why the properties should not be advertised for sale.

On the 16th August the decree-holder applied for the issue of a sale proclamation, "the attachment being taken to have subsisted since the order passed on the 27th March, 1905, on his previous application for sale of the same properties . . . . Previous to that order there had been an order passed on the 20th March, 1905 directing that the 'sale of the [other] property now for sale here is postponed indefinitely.'"

Notwithstanding Chhatrapat's opposition, the District Judge held that the application 19 of 1907 must be received as one in continuation of the former proceedings that the properties were still under attachment and that a sale proclamation might issue without the property again being attached. Though on the face

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of things it seemed no real concern of his, still Chhatrapat appealed, but the order was affirmed by the High Court. So much then, for the proceedings under the decree of 1896.

Under the other decree, that of 1901, an application for execution, No. 16 of 1907, was made by the decree-holder on the 16th July, 1907, in the Murshidabad Court. Notice was issued, and on the 29th July, 1907, an order was made for the issue of a warrant of attachment. On the 23rd August, 1907, attachment was effected. A claim was preferred by the present plaintiff, but the property was sold in execution, notwithstanding her opposition, the purchaser being the decree-holder, in whose favour an order had been made allowing the purchase money to be set off against the decretal amount, which was considerably in excess of the price.

The private alienation under which the plaintiff derives title was effected by two sale deeds expressed to be executed in her favour on the 15th July, 1907, by the judgment-debtor. The question in this litigation is which of the two titles is to be preferred, the plaintiff's or the decree-holder's.

The plaintiff alleges that hers is the earlier, and that the judgment-debtor had no right, title, or interest in the property in suit at the date of the attachment in execution case No. 16 of 1907, under which the decree-holder bought. The plaintiff also questions, with certain exceptions, the identity of the property in the two sales, but in the view their Lordships take, this topic need not be pursued. The decree-holder denies the plaintiff's priority of title, and contends that the assurances to her were collusive and fictitious; that the sale deeds, though purporting to be of a date prior to the attachment in execution case No. 16 of 1907, were in truth executed later; and that in any case the private alienation to the plaintiff was during the continuance of an attachment, and therefore void.

First, then, as to the alienation in favour of the plaintiff being, as it is termed in the respondent's case, collusive and fictitious. It is there alleged that "the judgment debtor, Babu Chhatrapat Singh, was, and always remained, the real owner o the properties in dispute." Strictly this means that the transaction was benami and not that it was a fraudulent transfer within the meaning of Section 53 of the Transfer of Property Act. The difference is distinct, though it is often slurred. To

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the suggestion that the transaction was benami, a complete answer is furnished by the admission that the judgment-debtor owed the plaintiff the amount stated to be the consideration for the sale deeds and more.

And even if the case for the decree-holder be treated as raising the further plea of a fraudulent transfer, this same admission operates strongly in the plaintiff's favour.

It may be that the judgment-debtor preferred the plaintiff, with whom he was connected by family ties, and that he did this of set purpose, yet this would not stamp the transaction as a fraudulent transfer. A debtor, for all that is contained in Section 53 of the Transfer of Property Act, may pay his debts in any order he pleases, and prefer any creditor he chooses. And whatever may be suspected, and however slender the confidence that Chhatrapat may inspire, there is no evidence on which any fraudulent intention can be imputed to the plaintiff.

Had it been made out that the sale deeds to the plaintiff were really executed after the attachment in execution case 16 of 1907, then there would have been justification for a finding of fraud; though in that case the finding would have been unnecessary, for the plaintiff's title would have been defeated, apart from fraud, under the express terms of S. 276 of the Civil Procedure Code.

But the contention that the sale deeds were ante-dated cannot be sustained. It is a general though not a conclusive presumption that a document was made on the day of the date it bears, so that for what it is worth the plaintiff starts with that in her favour; but her case does not rest there, for such oral evidence as there is on the point supports the presumption, and was not seriously challenged by cross-examination. It has been suggested that the plaintiff should have called other witnesses to the date of execution. But her advisers had no reason to apprehend that this contention would be advanced. It is not pleaded in the written statement, it is not raised in the issues, and the judgment of the First Court certainly does not suggest that it was given prominence even at the trial.

There may be ground for suspicion, and Chhatrapat's treatment of his creditors in the past may engender doubt, but the Court's decision must rest, not upon suspicion, but upon legal grounds established by legal testimony. Such as it is the legal

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proof here is all on the plaintiff's side, while if indirect signs are sought the keenness which marked the contest as to the continuation of the execution proceedings No. 8 of 1902 is hardly intelligible unless it be assumed that both parties realised the importance of the dates, and the dates could only have possessed importance if the sale deeds had been already executed.

But then it is urged for the decree-holder that the sales to the plaintiff, even if executed on the date the kobalas bear, are, nevertheless, void under S. 276 on the Civil Procedure Code. That section provides that when an attachment has been made as there described any private alienation of the property attached during the continuance of the attachment shall be void against all claims enforceable under the attachment. *Ex hyyothesi*, the alienation to the plaintiff was not during the continuance of the attachment in execution case No. 16 of 1907, or, in other words, the attachment under which the execution sale to the decree-holder was made. Therefore it cannot be avoided by that attachment.

But the decrre-holder argues that it was made during the continuance of the attachment in execution case No. 8 of 1902, and in support of this reliance is placed on the order of the District Judge of the 16th August, 1907, which was affirmed on appeal by the High Court.

The plaintiff is not bound by those decisions, and their correctness has been forcibly questioned before their Lordships. But it is unnecessary and inadvisable to deal further with this point, and more especially as there is another and surer answer to the decree-holder's plea. He relies on S. 295 of the Code of Civil Procedure as entitling him to the benefit of S. 276, and for this purpose he calls in aid his application for attachment in execution case No. 8 of 1902. To bring S. 295 into play certain conditions are necessary, and one of them is that there should be assets held by the Court. It has not been shown that there were such assets, and the indications in the record point the other way. But apart from this, S. 295 cannot help the decree-holder. Though the word "attachment" occurs three times in S. 276, the reference is to one, and only one, attachment; that one in this case is the attachment in execution case No. 16 of 1907. All that can be done is to employ that attachment for the purpose of impugning the private alienation,

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for it is on that alone that the decree-holder's title to the property in suit at present rests. So that even if it be assumed, for the sake of argument, that the view which prevailed in *Sorabji* v. *Govind*, [1] is correct, and that the conditions of S. 295 have been satisfied, it cannot advance the decree-holder's case.

It still is the attachment in execution case No. 16 of 1907, that is the only weapon of attack, and it is not made more effective by the earlier attachment in execution case No. 8 of 1902. All that earlier attachment can do in the circumstances of this case is to entitle the decree-holder to the benefit of the later attachment. He cannot claim to be in a better position than the decree-holder in execution case No. 16 of 1907, nor does it strengthen his position that it is the same person who is the decree-holder in both cases. To claim a higher right because the attachment in execution case No. 8 of 1902 is of an earlier date rests on an obvious confusion of thought.

The result then is that the appeal must be allowed, the decree of the High Court set aside, and the decree of the Subordinate Judge, so far as it directs that the plaintiff do get khas possession of the properties in suit, restored with costs in both Courts, and any costs paid under the decree of the High Court must be refunded and the costs of this appeal paid by the decree-holder.

And their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant:—*G. C. Farr.*

Solicitors for respondent:—*Watkins and Hunter.*

A. P. P.

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1. (1891) I. L. R, 16 Bom. 91.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Aiyangar.

Tuljaram Row ... *Appellant* in A. S. No. 74 of 1915 and Petitioner in C. R. P. No. 1046 of 1915 (2nd Defendant, Respondent).*

v.

Gopala Aiyan and others ... *Respondents in A. S. No. 74 of 1915 (Petitioners).*

Gopala Aiyan and others ... *Respondents in C R. P. No. 1046 of 1915 (Plaintiffs and Defendants No. 1, 3 and 4).*

Tuljaram Row v. Gopala Aiyan.

Civil Procedure Code—Order 23 Rule 1—Withdrawal with liberty—Order granting permission if and when a nullity—Subsequent suit for same claim if barred by res judicata—*Orders passed without jurisdiction and irregular orders—Distinction—Collateral attack*

Where a suit was as regards a portion of the claim allowed to be withdrawn with liberty to sue again, and it was contended that the subsequent suit therefo was barred by *res judicata*, reservation of liberty to sue in the circumstances being improper, *held*, that there being no decision on the portion of the claim withdrawn there was no bar by *res judicata.*

Parsotam Gir v. *Narbada Gir* [1], foll.

Quaere, whether an order granting permission to withdraw with liberty on an erroneous construction of the provisions of law which give the power can in a subsequent proceeding be treated as a nullity by the party dissatisfied with the order without its being vacated by him by proper proceedings.

The true rule is that if a Court has jurisdiction to pass orders of a particular kind, that in a particular case it passed an order which it should not have passed is not a case of total want of jurisdiction so as to render that order a nullity.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Tanjore in O. S. No 62 of 1913 and

Petition under S. 115 of Act V of 1908, paying the High Court to revise the order dated 31st August 1915, of the Court of the Temporary Subordinate Judge of Tanjore in I. A. No. 246 in O. S. No. 62 of 1913.

A. Krishnaswami Aiyar and *S. Rangachariar* for Appellant.

T. R. Ramachandra Aiyar, T. R. Krishnaswami Aiyar, S. Varadachariar and *K. Balasubramania Aiyar* for Respondents.

The Court delivered the following

Srinivasa Aiyangar, J.

Judgments:—*Srinivasa Aiyangar, J: In A. S. No. 74 of 1915*: This is an appeal of the 2nd defendant the present owner of the equity of redemption in a suit by the mortgagee to enforce his

* A. S. No. 74 of 1915, and C. R. P. No. 1046 of 1915. — 1st December 1916.

1. (1899) L. R. 26 I. A. 175.

Tuljaram Row v. Gopala Aiyan.

Srinivasa Aiyangar, J.

security. The mortgagee was himself the owner of the lands. He sold them to the 1st defendant's deceased husband one Jatavallabar on the 5th January 1899 who on the same day mortgaged them to the vendor to secure Rs. 11,000, the bulk of the price. The mortgagor covenanted to pay interest at half a rupee per cent per month, *i. e.*, 6 per cent per annum once every year. He agreed to pay Rs. 1000 out of the principal amount on the 30th July 1899 and the balance immediately the vendor mortgagee's minor sons attained majority, which event happened in April 1905, when the youngest of them became a major. In default of payment of the latter sum on the due date the mortgagor agreed to pay interest at 12 as. per cent per month (i. e.) 9 per cent per annum. Most of the interest has not been paid and no portion of the principal money and the suit is to recover the mortgage money by sale of the security. The plaintiffs, the 1st is the mortgagee and the other 2 are his sons, claimed interest at the rate of 9 per cent not merely on the sum of Rs. 10,000, but also on the sum of Rs. 1,000. It was allowed by the Lower Court and the first point raised in the appeal is against that claim. The language of the mortgage bond is quite plain and against the claim of the plaintiffs. The decree of the lower Court must be modified by allowing interest on the Rs. 1000 at 6 per cent per annum instead of 9 per cent.

The 2nd point is more serious and it is this. The mortgagee in 1903 sued for the interest accrued due till then and for the Rs. 1000 out of the principal. He prayed for the sale of a part of the security, *viz.*, that specified in Schedule B to that plaint to realise the interest and of another part specified in Schedule A to realise the principal amount. Jatavallabar was the 1st defendant in that suit but he died before the trial and on his death the present 1st defendant was brought on the record. Besides Jatavallabar, 3 other persons who apparently claimed the A schedule property adversely to both the mortgagor and the mortgagee were made defendants. Jatavallabar or the present 1st defendant did not appear to defend the suit, but the other defendants set up their adverse title. At the final hearing the plaintiff after having adduced evidence as regards his claim for interest against the mortgagor, 1st defendant, applied for leave to withdraw his claim for Rs. 1000 the first instalment of the principal with liberty to file a fresh suit on the ground that he was not ready with his

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evidence to prove his title to sell the A schedule properties with which alone the contesting defendants were concerned. This was allowed by the Judge and a mortgage decree was passed for the interest by sale of the B schedule properties; as regards the claim for Rs.1000 the order was "suit withdrawn in respect of the claim with liberty to sue again and plaintiff to pay corresponding costs of defendants 2 to 4". The appellant contends that the order permitting the withdrawal was beyond the competence of the Court and is a nullity and the present suit in so far as it includes a claim to recover Rs. 1000 and the subsequent interest is barred as the matter was *res judicata.* There is a short answer to this contention, viz., that if the previous order is a nullity, that being the only order which disposed of the claim for Rs. 1000, that claim still remains undisposed of and must be tried, and it has now been tried in this suit. In *Kali Prasanna Sil* v. *Panchanan Nandi* [1], which was principally relied on by the appellant, the 1st court had dismissed the suit on the merits and in appeal that dismissal was confirmed; but the appellate Court, in addition, purported to give leave to withdraw the suit with permission was held to be a nullity. The result was the original dismissal of the suit became final and the matter became *res judicata* under S. 11 of the Code corresponding to S. 13 of the Code of 1882. That appears also to have been the case in *Watson* v. *The Collector of Rajshahye* [2]. There, there was a dismissal of the suit for want of evidence which was a dismissal on the merits as is shown conclusively by the subsequent proceedings in the case. There was first a summary appeal to the Sudder Court, but they held that the appeal must be brought by way of a regular appeal *i.e.*, not as an appeal from an order, but as from a decree on the merits; and on a regular appeal being preferred the appeal was dismissed. See page 164 of the report, Macpherson's Civil Procedure Code, ch. XXXIX for summary appeals. There was no question of permission to withdraw, for there was no such procedure then and there was only a statement that the order then passed which was a decree for dismissal was not intended to bar the plaintiffs from proceeding as if the action had not been brought. This statement, it was held by their Lordships, could not prevent the actual dismissal from operating as a bar to the maintainability of the subsequent

1. (1916) 23 C. L. J. 489.

2. (1869) 13 M. I. A. 160.

suit under S. 2 of the Act of 1859 which corresponds to the present S. 11 of the Code. That those decisions do not affect the present case is obvious, for there had been no adjudication of any sort in the case on the claim of the plaintiff and the matter cannot therefore be treated as *res judicata*. The decision of their Lordships in *Parsotam Gir* v. *Narbada Gir* [1], is conclusive on the point. In that case there was first a suit for recovery of possession of certain villages which was decreed by the First Court which decree on appeal to the High Court was reversed and the suit dismissed. The appellate Court however expressly stated that they were not deciding on the rights of the parties. A second suit was brought by the same plaintiff against the representative of the same defendant for the same relief and their Lordships reversing the judgment of the High Court held that the subject-matter of the 2nd suit was not res judicata.

The provisions of clause 3 of Order 23, Rule 1 do not help the appellant as there has been no withdrawal without permission and the appellant is not entitled to treat one portion of the order, that giving permission as a nullity while holding the plaintiff bound by his withdrawal.

It is not therefore necessary to express an opinion on the question, whether an order granting permission to withdraw with liberty to sue again in a case when the Court grants such permission, on an erroneous construction of the provisions of law which give the power, is a nullity. But with all respect to the learned judges who decided otherwise, I venture to doubt whether such an order is a nullity as one passed without jurisdiction strictly so called. When a Court is properly seized of jurisdiction of the subject-matter of a suit and of the parties, orders passed in violation of the provisions of law regulating the further proceedings in the suit in relation to the subject-matter till the termination of the suit cannot be said to be so totally without jurisdiction as to render them nullities. It can only amount to a material irregularity in the exercise of jurisdiction; for example, there is order I rule 10 which gives power to the court to add or strike out parties; if an improper order is made under that rule can the parties ignore it and treat it as a nullity though such an order may be said to have been made in one sense without jurisdiction? (See the language used by Lindley, L.J.

1. (1899) L. R. 26 I. A. 175=21 All. 505.

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in *Moser* v. *Marsden* [1]. Or again if an injunction is issued or a receiver appointed under conditions or in circumstances not coming within the terms of the sections conferring the power can a party treat those orders as nullities ? I think the true rule is that if the court has jurisdiction to pass orders of a particular kind, that it passed an order which it should not have passed is not a case of total want of jurisdiction so as to render that order a nullity. This is well illustrated by *Gomatham Alamelu* v. *Komandur Krishnamacharlu*, [2] where a court having general jurisdiction of such suits rendered judgment for recovery of land outside its territorial jurisdiction and yet that judgment was held not to be a nullity.

The consequence of holding that an order giving permission to withdraw with liberty to sue again is a nullity and is capable of collateral attack may be serious. The terms of the rule are wide and in particular cases it may be very difficult to decide whether permission should or should not have been granted; orders improperly passed but with jurisdiction and orders passed without jurisdiction, are incapable of precise definition. In this very case there was a serious argument that the order was quite proper, at any rate it was not one passed without jurisdiction, though we are inclined to hold that the permission should not have been granted. If a party who is dissatisfied with such an order is to be allowed to treat it as a nullity in a subsequent proceeding, without vacating the order by proper proceedings, the plaintiff may be subject to a serious risk conceivably without any fault of his own. This was the view taken in *Perumal* v. *Karuppan*, [3] which was not cited at the bar, by my learned brother and another learned Judge of this Court and in *Chhaju* v. *Khiali Ram*, [4] by the Allahabad High Court. This contention must therefore be disallowed.

Two more points were taken, but were not pressed. The decree of the lower Court will therefore be modified in respect of interest as stated above and the appeal otherwise dismissed. The appellant will pay and receive proportionate costs here and in the court below from the plaintiffs.

The plaintiffs have preferred a memorandum of objections, but there is no substance in the points taken and it must be dismissed with costs.

1. (1892) 1 Ch. 491.
2. (1904) I. L. R. 27 M. 118.
3. (1911) 21 M. L. J. 574.
4. (1912) 14 I. C. 175.

It is agreed that 9 per cent. is to be substituted for 10½ per cent. as regards the principal, and the decree of the lower Court will be amended accordingly. Tuljaram Row v. Gopala Aiyan.

C. R. P. No. 1046 of 1915 is also dismissed as it has now become unnecessary.

Abdur Rahim, J.—I agree.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Oldfield.

Aiyavier ... (*Appellant* 1st Defendant*)

v.

Subramania Aiyar and others .... *Respondents (Plaintiffs and 2nd Deft.)*

Hindu law—Partition—Grandfather—Power to partition between himself and his grandsons—Gift of his share under the partition deed to a stranger by the same instrument—Validity of.

Aiyavier v. Subramania Aiyar.

Under Hindu law, a grandfather can, at his will effect an equal and fair partition between himself and his grandsons.

A co-parcener cannot make a gift of his undivided share. But once the co-parcenary is converted into a tenancy in common, there is no bar to a member of the family disposing of his share by gift; and it can make no difference in law, that the partition and gift are effected by one and the same instrument

Second appeal against the decree of the Court of Subordinate Judge of Kumbakonum in A. S. No. 325 of 1914 preferred against the decree of the Court of the District Munsif of Mayavaram in O. S. No. 23 of 1913.

T. V. Muthukrishna Aiyar and *K. S. Jayarama Aiyar* for Appellant.

Hon. T. Rangachariar and *G. S. Ramachandra Aiyar* for Respondents.

The Court delivered the following

Abdur Rahim, J.

Judgments:—*Abdur Rahim, J*:—The 3rd defendant who died since the institution of the suit at the age of about 92 was the grandfather of the plaintiffs—1st and 2nd respondents and divided brother of 1st defendant's father. He purported to make a settlement of the family property on 16th May 1911 by Exhibit A and the question under litigation was how far if at all it was valid and binding. Both the Courts have found that the settlement was not brought about by the exercise of fraud or undue influence on the part of the 1st defendant and I am unable to say that the finding is vitiated in law as contended for the 1st

* S. A. No. 1271 of 1915. 9th January, 1917.

Aiyavier v. Subramania Aiyar.

Abdur Rahim, J.

and 2nd respondents by the onus of proof being wrongly laid on them. The finding was arrived at on a consideration of all the circumstances and the evidence bearing on the point, and we are not at liberty to re-open it in second appeal. The Subordinate Judge, however, held that the settlement was validly revoked by the 3rd defendant by Ex. B inasmuch as according to him the 3rd defendant had executed Exhibit A under a mistaken notion that the plaintiffs were not of sound mind. Exhibit B had been executed not as the Subordinate Judge wrongly imagined after the institution of the suit but before it and it was under this mistake as to its date that he raised an additional issue and called for a finding upon the effect of the deed of revocation. It is undoubtedly strange that the plaintiffs should not have relied upon the alleged revocation in the plaint itself and it is also remarkable that the 3rd defendant should not have joined as a plaintiff in getting the deed of settlement set aside, if the allegations of the plaintiffs were well-founded. However that may be, even granting that the plaintiffs were not in fact of unsound mind as stated in Exhibit A, that in itself would not be sufficient in law to invalidate the settlement, Apart from any question as to whether the 3rd defendant at the time he executed the deed understood the nature of his act,—which plea so far as it was raised at the trial has been negatived—the mistaken assumption only bears upon the motive which induced the 3rd defendant to execute Exhibit A and does not amount to a mistake as to his rights which would justify the court in passing a decree for its cancellation.

It is clear from the provisions of Exhibit A by which the 3rd defendant sought to make a complete partition of the family properties, allotting to himself and the plaintiff the shares to which they were respectively entitled, that he intended to create a division of status and property. That being so, there can be little doubt that the settlement which he sought to make of his own share was valid in law. It is undoubtedly settled law that a co-parcener cannot make a gift of his undivided share (See *Baba* v. *Tima* [1] and *Ramanna* v. *Venkata* [2]) But once the coparcenary is converted into tenancy-in-common, there is no bar to a member of the family disposing of his share by gift, and it can make no difference in law that both the partition and gift were effected by means of one and the same instrument.

1. (1883) I. L. R. 7 M 357. 2. (1888) I. L. R. 11 M. 246

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But the settlement under Exhibit A is of specific properties (in schedule A) which the 3rd defendant reserved to himself for his share. That a Hindu father can partition the family property between himself and his sons is well established in this Presidency. (See *Kandasami* v. *Doraisami Iyer* [1], *Murugayya Maniayakaran* v. *Palaniandi Maniayakaran* [2]. It is hardly disputed that the fact that there are grandsons can be no bar to the exercise of his rights; for the grandsons' right is to stand in the shoes of their father. The question then arises, should the death of the son make any difference. There is no express decision on this point, but it is difficult to see why it should. The right of a father to partition family property between himself and his sons and their sons would seem to include the right to make such partition when the sons are dead and grandsons alone are living. A partition at the will of the father can only be valid if it is equal and fair. In this case there can be no doubt that it was so as was conceded before the District Munsif and is amply clear from the facts.

The Subordinate Judge's judgment must be set aside and the decree of the District Munsif restored with costs here and in the court below.

Oldfield, J.

Oldfield, J.:—I entirely agree and only wish to add a few words regarding the scheme of the settlement, Exhibit A and Mr. T. Rangachariar's argument from its terms. It no doubt begins with a statement that plaintiffs have lost their right to the settlor's properties, because they are of unsound mind. But, looking to the fact that it was apparently drafted without legal advise and to the clear statements contained in its later provisions, I find no difficulty in holding that the settlor's intention was to make a partition, the reference to plaintiffs' incapacity having no effect, except that their shares were vested during its continuance in 1st defendent for their benefit. As they were never really incapable, that and the further provisions for 1st defendant's reversionary interest never took and never could have taken effect. Exhibit A being essentially an expression of intention to adopt a divided status, my learned brother's conclusion follows, that the gift of the settlor's share to 1st defendant is valid, notwithstanding that it is contained in the same document.

I therefore concur in the decree proposed.

C. A. S.

1. (1880) I. L. R. 2 M. 317.

2. (1916) 31 M. L. J. 147.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir John Wallis, Chief Justice and Mr. Justice Spencer.

Nochulliyil Eazhuvan Theethisson Theethalan — *Appellant** (*7th Defendant*)

v.

The Eralpad Rajah styled Elaya Rajah Avergal of Patinhara Kovilagom in Calicut (deceased) and others. — *Respondents (Plaintiff and defendants 1 to 6 and 8 to 50 and L. R. of the Plaintiff).*

Nochulliyil Eazhuvan Theethisson *v.* Eralpad Rajah styled Elaya Rajah.

Transfer of Property Act, S. 108 (j)—Lessor and Lessee—Rent—Mortgagee with possession from lessee, not liable for rent to lessor.

A mortgagee with possession from a lessee is not liable to the lessor for rent, there being neither privity of estate nor privity of contract between the parties.

Authorities on the subject reviewed by the Chief Justice.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Palghat in A. S. No. 211 of 1913 preferred against the decree of the Court of the District Munsif of Alatur in O. S. No. 43 of 1912.

Suit to recover *Michavaram* (Jenmi's share of rent) in respect of lands granted on *anubhavam* (perpetual) right by plaintiff's stanom to the ancestor of defendants 1 to 6 and 10 to 50. Defendants 7 to 9 are assignees of a mortgage with possession executed by the other defendants. The deed of assignment under which defendants 7 to 9 came into possession of the lands contained a direction that they should pay the Jenmi's *Michavaram.* Both the Courts below decreed the suit against all the defendants. The lower appellate Court held that the 7th defendant was liable on the ground that there was both privity of estate and privity of contract between him and the plaintiff. The 7th defendant preferred a second appeal.

K. R. Subramania Sastri for Appellant.

T. R. Ramachandra Aiyar for Respondent.

The Court delivered the following

The Chief Justice.

Judgments:—*The Chief Justice*:—The question raised in this appeal is whether mortgagees with possession from lessees are liable to the lessor for rent. The Subordinate Judge has held that they are liable on the ground that privity of estate exists between them. In this I think he is clearly wrong. Privity of estate is a technical term of English law, and it is clear that under

* S. A. No. 1035 of 1914. 17th January, 1917.

Noohulliyil Eazhuvan Theethisson Theethalan v. The Eralpad Raja styled Elaya Rajah.

The Chief Justice.

that law no such privity arises unless the whole of the lessee's interest is assigned over. Where a subsidiary interest is carved out of the lessee's interest no fresh privity arises. For instance there is no privity of estate between a lessor and a sub-lessee. Where the lessee mortgages his whole lease-hold interest, privity arises in English law, because there the mortgage is by conveyance with a right to a reconveyance, and therefore the whole interest of the lessee is assigned to his mortgagee; but, as this is not considered a desirable state of things, conveyancers prevent such privity of estate from arising by making the mortgage by way of sub-lease of something less than the whole interest of the lessee. In India a mortgage such as this is not an out and out transfer of the mortgagor's interest (S. 58, Transfer of Property Act) and therefore on the English doctrine no privity of estate can arise.

We have however to consider the provisions of the Transfer of Property Act as to leases which should be followed in India in preference to English decisions even where it does not in terms apply, as to agricultural leases. S. 108 (j) provides, "the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property.................The lessee shall not, by reason, only of such transfer, cease to be subject to any liability attaching to the lease." One effect of this provision is that the lessee does not cease to be liable on the lease by reason of an out and out assignment, but he will, as in England, cease to be liable if the lessor accepts rent from the assignee and thereby creates a privity of contract between them. It is also to be noted that the liabilities of the transferee arise, as in England, on and by reason of the transfer, and do not depend on the question whether the transferree has obtained possession, *Monica Katheria Saldanha* v. *Subraya Hebbara* [1], *Kunhi Sow* v. *Mulloli Chathu* [2]. If the transfer is absolute, it has been held that the transferree becomes liable to the lessor, (*Kunhanujan* v. *Anjelu* [3]) as in that case privity of estate arises under the English decisions. The section however says nothing about privity of estate, and the question really is what is the intention of the legislature as regards transfers by the lessee by way of mortgage in the Indian form or by sub-

1. (1907) I. L. R. 30 M. 410. 2. (1912) I. L. R. 38 M. 86.
3. (1896) I. L. R. 17 M. 296.

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The Chief Justice.

lease, in which cases there would clearly according to the English decisions be no privity of estate on which the liability could be rested. The case in *Kunhanujan* v. *Anjelu*, [1] does not afford much assistance, for that was a case of an assignment or absolute transfer of the lease, and all that was held was that there was nothing in the section to prevent the transferree being liable on the doctrine of privity of estate as in England. It is quite another thing to hold that in the case of a mortgage or sub-lease by the lessee the transferree becomes liable directly to the lessor, as such liability cannot be based on any recognised doctrine of privity of estate. The decision in *Kannye Loll Sett* v. *Nistoriny Dossee*, [2] appears to have proceeded on the footing that the mortgage in that case amounted to an assignment or transfer of the lease-hold interest in which case privity of estate would arise, and is of no assistance in the present case where the transfer by mortgage did not amount to an assignment or out and out transfer. This is clearly pointed out by Farran, C. J., in *Timmappa Kuppaya* v. *Rama Venkanna Naik* [3] where however, as has been pointed out in *Vital Narayan* v. *Shriram Savant* [4] the word contract both in the head-note and the judgment is a slip, what was meant being not privity of contract but privity of estate. "A sub-lease differs from the assignment of a lease in that it creates no privity of contract (read, estate) between the sub-tenant and the landlord. The landlord has to deal with his lessee and not with the sub-tenants of the latter. The English authorities show conclusively that a landlord putting an end by a proper notice to the tenancy of his tenant thereby determines the estate of the under-tenants of the latter. This is undoubted law". Later on the learned Judge observes "An assignee of a lease is of course in a different position, for he is brought by his assignment into direct relations with the landlord" that is to say in the language of the English law that privity of estate arises between them. It appears clear that the learned Chief Justice did not consider that in India sub-lessees could be sued for rent by the lessor under S. 108 (j) of the Transfer of Property Act or for any other reason. To so hold would be a very serious innovation. We cannot hold that in India the mortgagee in possession is to be directly liable to the lessor for rent without applying the same doctrine to the sub-

1. (1893) I. L. R. 17 M. 296.
2. (1884) I. L. R. 10 C. 443.
3. (1895) I. L. R. 21 B. 311 at 313.
4. (1905) I. L. R. 29 B. 391.

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lessee. Both are governed by the same S. 108 (j) of the Transfer of Property Act, and, if actual possession of the land is to make the one liable for rent, it must also be the case with the other. It was no doubt held in *Vithal Narayan* v. *Shriram Savant* [1] that a mortgagee of a lease-hold interest if in possession is liable for rent to the mortgagor; and one reason given is that the distinction between legal and equitable estates does not exist in India. As already pointed out, it is owing to that distinction that in England a legal mortgagee of a lease is held liable for rent to the lessor where the mortgage is an assignment creating privity of estate, but an equitable mortgagee is not so liable; and to avoid this untoward consequence it is usual to create a legal mortgage by way not of an assignment having this effect, but by way of sub-lease of something less than the lessee's interest so that no privity of estate and no liability on the part of the mortgagee arises. This is the invariable practice as stated in the standard works of Coote, Fisher and Robins. The decision in *Kannye Loll Sett* v. *Nistoriny Dossee*, [2] proceeded as already pointed out on the view that the mortgage was an out and out assignment of the lease which it is not in the present case or ordinarily in India. The judgment of Lord Mansfield in *Eaton* v. *Jaques* [3], which was also referred to is if any thing an authority the other way. What Lord Mansfield held was that the mortgagee of a lease-hold interest, even when the mortgage was by way assignment of the whole term, was not liable for rent by virtue of privity of estate, unless he obtained possession as well, a point on which he was overruled by ten Judges in *Williams* v. *Bosanquet* [4]. Both cases however proceed upon the view that the mortgagee is not liable at all to the lessor unless the mortgage be by way of assignment of the term. "All this", Lord Mansfield observed, "arises from a mere slip in the attorney in making the conveyance; for, if he had made it an under-lease by leaving a reversion of a day in the mortgagor, the landlord would have had no pretext to call upon the mortgagee." It is thus clear that what Lord Mansfield was arguing against was the mortgagee being held liable unless there were both privity of estate and possession, and that his judgment is no authority for the position that possession in the absence

1. (1905) I. L. R. 29 Bom. 391.
2. (1884) I. L. R. 10 C. 443.
3. (1780) 2 Dougl. 455.
4. (1819) 1 Br. & B. 238.

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The Chief Justice.

of privity of estate will make the mortgagee liable. See also *Cox* v. *Bishop*[1] and *Ananda Chandra* v. *Abdullah Hossein Chowdhury*[2]. I am therefore of opinion with great respect that the authorities referred to in *Vithal Narayan* v. *Shriram Savant*[3] do not support the decision. No such liability is imposed by English Law on sub-lessees or on mortgagees from lessees either, except as pointed out by Lord Mansfield owing to the mere slip of an attorney, and if it is to be imposed in India it must be by virtue of Section 108 (j) of the Transfer of Property Act and not by virtue of possession. The latter part of the section shows that sub-leases and mortgages created by the lessee do not affect the rights of the lessor against the lessee, still less do they affect the rights of lessee against his sub-lessee or mortgagee. There appears to be no sufficient reason for supposing that it was the intention of the legislature by this section to bring the sub-lessee and the mortgagee from the lessee into direct relations with the lessor. I read the judgment of Farran, C. J., in *Timmappa Kuppaya* v. *Rama Venkanna*[4] as holding that it has no such effect as regards sub-lessees, and can see no reason for applying a different rule to mortgages from the lessee. To hold otherwise would, it need hardly be pointed out, introduce all sorts of complications as to apportionment, notice to quit etc. For these reasons I think the Lower Courts were wrong and would modify the decree by dismissing the suit as against the appellant and defendants 8 and 9 with costs throughout.

Spencer, J.

Spencer, J:—I concur. The only case in which a mortgagee of a lease-hold interest in India becomes after entering into possession liable to pay the rent appears to be where his possession is attributable to his having obtained a decree for foreclosure, the reason being that in such a case the lessee parts with the whole of his interest, and the entire interests both of the lessee and of the mortgagee become by operation of law merged in the person of the latter; vide *E. Macnaghten* v. *Bheekaree Singh*[5] and *Ananda Chandra Roy* v. *Abdullah Hossein Chowdhury*[2].

Here the defendants 7 to 9, who are mere transferees of a Kanom interest, are clearly possessed of something less than the *Anubhavam* interest under the lease in favour of 1 to 6

1. (1857) 8 De. G. M. & G. 815.
2. (1913) I. L. R. 41 C 148.
3. (1905) I. L. R. 29 B. 391.
4. (1895) I. L. R. 21 B. 311.
5. (1878) 2. C. L. R. 323.

defendant's predecessors. Consequently the agreement in Exs. III, IV and VII between the lessees and the mortgagees and their assignees *inter se* that the mortgagees should pay the michavaram or rent will not affect the right of the lessor to look to his lessees for the recovery of his, rent, and to them alone. Even if the mortgage document were silent as to the rent, S. 65 (d) Transfer of Property Act provides that the mortgagor shall pay the rent reserved by the lease so long as the mortgagee is out of possession of the mortgaged property, which may be read as implying that the mortgagee should pay it if he gets into possession. But this section deals only with the rights and liabilities of the mortgagor and the mortgagee as between themselves. The rights and liabilities as between the mortgagor and his lessor are regulated by S. 108 (j).

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The Subordinate Judge who heard the first appeal observed that there was not only privity of estate but privity of contract also. He has given no reasons for his opinion but simply states that plaintiff can enforce the provision in his favour in Ex. VII though he was not a party to it. Privity of contract is personal privity and extends only to the person of the lessor and to the person of the lessee (*vide Walker's case* [1]).

It has not been suggested that there is any foundation in the records of this case for a personal privity existing between the lessor and the mortgagees.

The Appellant is entitled to succeed in his appeal with costs throughout.

A. V. V

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Aiyangar.

Ramasamy Nadan and others ... (*Appellants* Plaintiffs.*)

v.

Subramania Nadan and others ... *Respondents* (*Defendants.*)

Ramasamy Nadan *v.* Subramania Nadan.

Court Fees Act, S. 7 iv (c)—Suit for declaration that a sale by official receiver is invalid and for the appointment of a fresh receiver and to make over properties to him—Declaration valued for jurisdiction at a large amount—Court fee of Rs. 10 paid thereon—Ad valorem Court fee on other reliefs—Proper. Court fee paid on the plaint.

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* A. S. No. 260 of 1916. 26th January 1917.

1. (1589) 3 Co. Rep. 22 a t 23 a.

Ramasamy Nadan v. Subramania Radan.

Where the plaintiff, an insolvent instituted a suit claiming mainly 2 reliefs, (1) a declaration that certain sales made by the official receiver of his properties were not valid (2) that a fresh receiver should be appointed and the properties made over to him and he valued the declaration for the purpose of jurisdiction at Rs. 38,000 and paid a Court fee of Rs. 10 on it, and he valued the second relief at Rs. 100 and paid an ad valorem Court fee of Rs. 7 as 8 on it.

Held, the proper Court fee on the plaint was paid by the plaintiff and ad valorem Court fee on Rs. 38,000 need not be paid.

Appeal againt the order of the Court of the Subordinate Judge of Tinnevelly dated the 24th day of April 1915 in O. S. No. 48 of 1914.

Dr. S. Swaminadhan, A. Chidambaram and *K. P. Ramakrishna Iyer* for Appellants.

S. Ramaswami Aiyar for Respondents.

The Court delivered the following

Judgment:—The plaint contains two principal prayers; firstly, that certain sales in favour of the defendants Nos. 2 to 18 made by the Official Receiver Gopala Aiyar be declared to be not valid in law, and secondly that a fresh receiver be appointed and the properties made over to him. On the first prayer plaintiffs have paid Rs. 10 that is for the declaratory relief valuing the suit for purposes of jurisdiction at Rs. 38,000; and the 2nd prayer they valued at Rs. 100 and have paid thereon an *ad-valorem* fee of Rs. 7-8-0. The Subordinate Judge is of opinion that they ought to have paid *ad-valorem* fee on Rs. 38,000. He relies upon certain rulings of this Court in support of that view. We do not think that those rulings really lay down any such proposition. The case in *Achammal* v. *V. Achammal* [1] which follows the case in *Chingacham Vittil Sankaran Nair* v. *Chingacham Vittil Gopala Menon* [2] and also the case in *Samiya Mavali* v. *Minammal* [3] were all cases in which the plaintiff was a party to the deed which he wanted to have declared invalid on the ground of fraud or on similar allegations. But in this case the plaintiffs were no parties to the sales and they seek to have a declaration to the effect that the sales were brought about by the fraud of the Official Receiver and consequently not valid and binding upon them. As pointed out in a somewhat similar case in *Unni* v. *Kunchi Amma* [4] the claim for the cancellation of the deeds of

1. (1910) 20 M. L. J. 791.
2. (1906) I. L. R. 30 M. 18.
3. (1899) I. L. R. 23 M. 490.
4. (1890) I. L. R. 14 M. 26.

Rsmasamy Nadan v. Subramania Nadan.

sales was not a necessary part of the relief which the plaintiffs were seeking and therefore it was not right to say that the suit was in substance a suit to obtain the cancellation of the instrument.

Granting that it was so, the plaintiffs were entitled to value the relief as they liked to pay the fee on such valuation. Even if the second prayer may be taken to amount to consequential relief that would not in our opinion make any difference, because under S. 7 Clause 4 sub clause (c), the plaintiffs are liable to pay court fee on their own valuation. It is contended by the learned Vakil for the respondents that as a matter of fact the valuation for the purposes of court-fee must be taken to be Rs. 38,000 which was the valuation in the plaint for the purposes of jurisdiction. But he overlooks the fact that the consequential relief on which alone the fee was to be paid at the *ad valorem* rate has been valued at Rs. 100 which the plaintiffs were entitled to do and they have paid court fee on that. We do not think therefore that the order of the Subordinate Judge is right. It will be set aside and the case will be remitted to him for disposal according to law. Costs will abide the result.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

P. V. Allapichai ... *Appellant** (*Petitioner*).

v.

Kuppai Pichai Rowther and others ... *Respondents* (*Counter-Petitioners-Creditors 1 to 5.*)

Allapichai v. Kuppai Pichai Rowther.

Provincial Insolvency Act (*III of* 1907) *Ss* 16, 22 *and* 46—*Insolvency—Application by debtor to be adjudicated insolvent—Dismissal of, by Official Receiver—Confirmation by District Court on application under S.* 22—*Appeal to the High Court—Maintainability of—Dismissal of debtor's application to be adjudicated insolvent—Grounds for.*

Where the Official Receiver dismissed a debtor's application to be adjudicated insolvent and the District Court on an application under S. 22 of Provincial Insolvency Act confirmed the decision of the Official Receiver.

Held that an appeal lay to the High Court from the order of the District Court.

An application to the District Court under S. 22 of the Provincial Insolvency Act to revise the decision of the Official Receiver, is not an appeal from a Court subordinate to the District Court within the meaning of S. 6 (1) of the Act.

* A. A. O. No. 4 of 1915. 26th October, 1916.

Allapichai v. Kuppai Pichai Rowther.

Where the Court below dismissed an application by a debtor to be adjudicated insolvent, on the grounds that he had no realisable assets, that he might be concealing his accounts, cash, and outstandings, that he was not likely eventually to get his discharge and that therefore the petition was an abuse of the process of the Court,

Held that the order was based on a misconception of the objects of the insolvency procedure and should be set aside.

Appeal against the order dated the 4th day of September 1914 of the District Court of Ramnad at Madura in C. M. A. No. 21 of 1913 preferred against the order of the Court of the Official Receiver of Ramnad at Madura in Insolvency Petition No. 17 of 1912.

B. Sitarama Rao and *S. R. Muthusami Aiyar*, for the Appellants.

K. Bhashyam Aiyangar for the Respondents.

The Court delivered the following

Oldfield, J.

Judgments:—*Oldfield, J.*—This is an appeal against the order of the District Judge of Ramnad rejecting an application under S. 22 of the Provincial Insolvency Act, to revise the order of the Official Receiver of his District, dismissing the appellant's application to be adjudicated insolvent.

The preliminary objection has been taken that such an order is not appealable. The objection is supported on the ground that the Official Receiver is a court Subordinate to the District Court and that the decision of the latter in appeal from him is final under S. 46 (1). The questions are whether the Official Receiver is a Court and whether an application under S. 22 against his decision is an appeal. If they are answered in the affirmative, it would in my opinion follow that he is a court subordinate to the District Court. I deal with each question, as far as posssible, separately, although they must be dealt with to some extent on common grounds.

As regards the first, it is greatly against Respondents' contention, that neither Official Receivers nor receivers under the Act generally are expressly included in any definition of Court, "the Court" or "District Court", which the Act contains. If then they are to be treated as courts, it must be by implication from the provisions regarding their duties and the character of their orders; and argument has accordingly been based on S. 52 (2). That provision does not apply to one portion of the Official Receiver's duties, those which he performs in exercise of the

Allapichai v. Kuppai Pichai Rowther.

Oldfield, J.

powers, which an ordinary Receiver possesses under S. 20, which are merely the executive acts of an officer of the Court and which need no more be supposed subject to appeal (in the strict sense) than those of any receiver appointed under the Civil Procedure Code. The provision applies only to the exercise by the Official Receiver of the Court's powers, which can be delegated to him under S. 52 (1). No doubt those powers, which include such a refusal to pass an order of adjudication as is in question before us, are of a judicial character; and respondent relies on the fact that under S. 52 (2) "an act done or order made in their exercise is to be deemed an act of the Court". But that wording seems to me rather to support appellant's contention that the Official Receiver's judicial acts and orders have a judicially binding authority, not intrinsically, but only derivately in consequence of the character attached to them by legal implication, as acts of the court, not of a court, as Respondents' argument requires.

The wording of S. 52 (2) reproduces with one qualification, to which I return, that of S. 99 (1) of the English Bankruptcy Act of 1883, which was in force when the Provincial Insolvency Act was passed; and its effect is to make the decisions of the Official Receiver authoritative and appealable as the decisions of the court under which he works, like those of the Registrars of Courts in England. Vide *Re Maughan* [1]. The qualification above referred to consists in the provision that the Official Receiver's decisions shall have this authoritative character subject to the appeal to the court provided by S. 22, the wording of which follows that of the English S. 90. S. 90 however provides for a right of application to the court in order to displace the acts or decisions only of the Official Receiver or trustee, which are of an executive character and, with one exception (the disposal of proofs of debts), correspond with those of a receiver under the Indian S. 20. The conclusion is that in India the Official Receiver with delegated powers combines the functions of the English Official Receiver or Trustee and Registrar, and that the procedure under S. 22, which in England is applied only to the acts or decisions of the former has been applied by the Indian Act to those of an officer, who fills both capacities. When the procedure under S. 22 was not in its origin of the nature of an appeal against a court's order and when it need not be treated as

1. (1888) 21 Q. B. D. 21.

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Oldfield, J.

providing one in cases, in which the Official Receiver's proceedings under S. 20 are in question, it is difficult to hold that its nature is changed, when it is applied to the decisions covered by S. 52 (2). As the Bankruptcy Act contemplated no application to the Court against a Registrar's decision, direct English authority for this view is not to be expected. But the analogy between the decisions of an Official Receiver in India and those of an Official Referee with regard to the English Order 40 Rule 6 is, as Respondent contends, close; and it was held in *Wynne Pinch* v. *Chaytor* [1], overruling *Daglish* v. *Barton* [2] cited by respondent, that an application to displace the latter was not an appeal.

Other support for the same conclusion is afforded, to return to S. 46 of the Provincial Insolvency Act, by the considerations that (1) S. 22 occurs in a different portion of the Act from S. 46 and is not referred to in it, although the period of limitation specified in the former differs from that in the latter, and (2) if Respondent's contention be accepted, S. 46 provides in Cl. (1) for the anomaly of a second appeal to the District Court from the Official Receiver's decision without restriction of the grounds, on which it can be taken. There is on the other hand no doubt the fact that an application under S. 22 is referred to in S. 52 (2) as an appeal. But the difficulties already referred to in the way of strict construction of the term are such that an interpretation of it in one of the ways enumerated by Subramania Aiyar, J. in *Chappan* v. *Moidin Kutti* [3] or as it was used loosely by the learned Judge in *Daglish* v. *Barton*[2] must be preferred. The considerations referred to, especially that regarding limitation, in my opinion justify a decision in Appellant's favour, that an application under S. 22 is not an appeal.

Indian authority also supports this view. In *Chidambaram* v. *Nagappa* [4] an application under S. 22 is no doubt described as an appeal. But nothing turned on the description. In *Doraisami Iyengar* v. *Meenakshi Sundara Iyer* [5] and *Thakur Prasad* v. *Pamotal* [6] it was held that an application under S. 48 was not an appeal. In these circumstances I hold that the preliminary objection is unsustainable and turn to the merits.

1. (1903) 2 Ch. 475.
2. (1900) 1 Q. B 284.
3. (1892) I. L. R. 22 M 68=8 M. L. J. 231
4. (1912) I. L. R. 38 M. 15.
5. (1914) 16 M. L. T. 246
6. (1913) I. L. R. 35 A. 410.

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Oldfield, J.

Appellant's application to be adjudicated insolvent was dismissed by the Official Receiver, and the Lower Court upheld the dismissal on the grounds that he had no realizable assets, that he might be concealing his accounts, some ready cash and some outstandings in the Strait Settlements which he first mentioned in his examination, that he was not likely eventually to get his dicharge, and that therefore his petition was an abuse of the process of the Court. This conclusion is in my opinion based on a misconception of the objects of the insolvency procedure. It is supported by the Lower Court by reference to *Jeer Chetti* v. *Rangaswami Chetti*[1] in which *Girwardhari* v. *Jai Narain*[2] is followed. But both those decisions contemplate refusal of adjudication only in exceptional cases, the second referring explicitly to instances, in which that course was upheld; and the present case in no way resembles any of them. In these circumstances the appeal must be allowed, and the orders of the Lower Court and Official Receiver be set aside, the latter being directed to restore the petition to file, pass an order of adjudication and take further proceedings in accordance with law. No order as to costs here or in the Lower Court.

Seshagiri Aiyar, J.

Seshagiri Aiyar, J:—The District Judge of Ramnad transferred the petition of a debtor to be adjudged an insolvent to the Official Receiver. The petition was dismissed. On appeal, the District Judge confirmed that order. The debtor has preferred this appeal to the High Court. Mr. Bhashyam Iyengar took a preliminary objection on behalf of the respondent that the appeal does not lie.

His contention was that under Section 46 of the Provincial Insolvency Act, the decision of the District Judge on appeal is final and that no second appeal is allowable. The point for decision is whether the appeal contemplated by Section 46 covers one from the Official Receiver to the District Judge. The language employed in Clause (2) of Section 52 lends support to the contention of the learned Vakil. But on turning to S. 22, we find that an application is spoken of to revise the order of the Receiver and not an appeal. It looks as if the words "subject to the appeal to the Court provided for by S. 22" in clause (2) of S. 52 have been used *per incuriam*.

Mr. Sitaram Rao drew our attention to the fact that S. 46 provides for an appeal by the person aggrieved against "an order

1. (1911) 22 M. L. J. 52. 2. (1910) I. L. R. 32 A. 645.

Allapichai v. Kuppai Richai Rowther.

Seshagiri Aiyar, J.

made in the exercise of Insolvency Jurisdiction by a *court subordinate to the District Court.*" I do not think that an official Receiver can be said to be a *Court subordinate to the District Court.* S. 2 (g) read with the proviso to S. 3 (1) makes it clear that that the Courts referred to in S. 46, are those on whom the Local Government had conferred Insolvency Jurisdiction. Another argument of the learned vakil for the Appellant related to the period of limitation provided by clause (4) of S. 46. Thirty days and ninety days are respectively the period of limitation for appeals to the District Court or to the High Court as the case may be. If appeals from Official Receivers were within S. 46, there can be no necessity for making a special provision in regard to them, as has been done in S. 22 by shortening the period to 21 days. It is therefore clear that S. 46 does not cover appeals from the Official Receiver. The language of S. 86 of the Presidency Towns Insolvency Act confirms this conclusion. Unlike S. 22 of the Provincial Insolvency Act, it speaks of an appeal from the decision of the Official Assignee. This is apparently because the Legislature has given more powers to the Official Assignee and has clothed him with greater judicial responsibility than the Official Receiver. It is noteworthy that under the Insolvent Debtor Act, before the Presidency Act of 1909 was passed, an application was spoken of to revise the Official Assignee's order and not an appeal.

Further, under the Notification of the Government, there can be an Official Receiver in a Munsif's Court. Under S. 22 this officer's orders are revisable by the District Munsif. Against that an appeal would lie to the District Judge. Thus there will be a second appeal in such cases: Whereas in the case of orders passed by an Official Receiver working under a District Judge there can be only one appeal if the contention of the appellant were upheld. I see no reason for imputing this inconsistency to the legislature.

As regards decided cases, in *Chidambaram* v. *Nagappa* [1] it seems to have been assumed without deciding that appeals would lie under S. 46 from the orders of the Official Receiver. On the other hand, *Thakur Prasad* v. *Panno Lal* [2] holds that proceedings against the orders of the Official Receiver are not by way

1. (1912) I. L. R. 38 M. 15. 2. (1911) I. L. R. 35 A. 410.

Allapichai v. Kuppai Pichai Rowther.

Seshagiri Aiyar, J.

of appeal. *Duraisami Iyengar* v. *Meenakshi Sundara Aiyar* [1] follows this decision. *Mul Chand* v. *Murari Lal* [2] is to the same effect. Mr. Bhashyam Iyengar quoted *Daglish* v. *Barton* [3] (it is also reported in (1900) 1 Q. B. 284), for the position that where a case is referred to an Official Referee, an appeal would lie to the Court of Appeal from his decision. There is some analogy between that and the present case. But the analogy would only lead to the inference that the appeal from the Official Receiver should have been preferred to the High Court. Apart from this, in *Wynne Punih* v. *Chaytor* [4] Lord Justice Stirling in a considered Judgment of the Court of appeal points out that although the Official Referee had all the powers of the Court delegated to him, under Order XL, Rule 6 of the Judicature Act, the proper procedure was to apply to act aside the judgment. The court of appeal refused to accept the dictum in *Daglish* v. *Barton* [5] as correct. The language of S. 22 of the Provincial Insolvency Act is apparently based on Order XL Rule 6. Further it has been generally the practice in this court to hear appeals from the decision of the District Judges interfering with the order of the Official Receivers. That practice seems to me to be in consonance with law. I, therefore, agree in overruling the preliminary objection. On the merits, I am clear for the reasons given by my learned colleague, the order of the District Judge is wrong. The order must, therefore, be set aside.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Seshagiri Aiyar.

Nimmala Mahankali, minor by guardian Gorri Gangyya	... *Appellant* (Counter-Petitioner-Defendants.*
v.	
Kallakuri Seetharamiah and another.	*Respondents (Petitioners Plaintiffs).*

Nimmala Mahankali v Kallakuri Seetharamiah.

Limitation Act, Arts. 181 and 182—Mortgage—Preliminary decree for sale before the C. P. Code of 1908—Expiry of time fixed for payment of money, after the new code came into force—Application for final decree—Limitation—Starting point—Appeal by mortgagee-decree-holder from preliminary decree—Effect of.

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* A. A. A. O. No. 109 of 1915. 8th December 1916.

1. (1914) 16 M. L. T. 246.
2. (1913) I. L. R. 36 A. 8.
3. (1900) 81 L. T. 551.
4. (1903) 2 Ch. 475.

Nimmala Mahankali v. Kallakuri Seetha-ramiah.

In a suit for sale on foot of a mortgage a preliminary decree was passed on 28-9-1908 giving the mortgagor time till 28 3-1909 to pay up the decree amount. The mortgagee-decree-holder preferred an appeal and a second appeal from the preliminary decree and the decree on second appeal was passed on 29-7-1910 confirming the decrees of the courts below. On 18-7-1913 the decree-holder presented an application for execution which was dismissed for non production of the decree of the first court. On 19-8-1914 the decree-holder applied for a final decree and the application was opposed by the judgment-debtor on the ground that it was time-barred.

Held, that Art. 181 of the Limitation Act and not Art. 182 applied to the case and that, as time began to run from the date of the decree in second appeal, the application was not barred.

Husain v. *Karim*.[1] dist. *Lakshmi Achi* v. *Subbarama Iyer*,[2] *Beni Singh* v. *Berhamdeo Singh*,[3] *Madho Ram* v. *Nihal Singh*,[4] *Ramaswami Kone* v. *Sundara Kone*,[5] *Manavikrama* v. *Muniappan*,[6] referred to.

Appeal against the decree of the Court of the Subordinate Judge of Kistna at Ellore in A. S. No. 24 of 1915 preferred against the order of the Court of the District Munsif of Bhimavaram in C. M. P. No. 1822 of 1914 in O. S. No. 274 of 1907 on the file of the District Munsif's Court of Narasapur.

The suit out of which the proceedings in execution arose, was one for sale on foot of a mortgage. The preliminary decree in the suit was passed on 28-9-1908 under the decree the mortgagor had six months to pay the amount of the decree and the time expired on 28-3-1909. Against the decree the mortgagee-decree holder preferred an appeal and a second appeal. On 29-7-1910 the decree on second appeal was passed confirming the decrees of the Courts below. On 18-7-1913, the mortgagee-decree-holder put in a petition for execution which was dismissed for non-production of the decree of the first Court. On 19-8-1914 he applied under O. 34 R. 5 of the C. P. Code for the passing of a final decree.

Both the Courts below passed a final decree and the judgment-debtor preferred a second appeal to the High Court.

1. (1915) I. L. R. 39 M. 544.
2. (1915) I. L. R. 39 M. 448=28 M. L. J. 491.
3. (1915) 19 C. W. N. 473.
4. (1915) I. L. R. 38 A. 21.
5. (1907) I. L. R. 31 M. 28=17 M. L. J. 495.
6. (1891) I. L. R. 15 M. 170=2 M. L. J. 28.

Nimmala Mahankali v. Kallakuri Seetharamiah.

V. Ramadoss for Appellant.

B. Somayya for Respondents.

The Court delivered the following.

Judgment:—The decree in the Original Suit was passed on the 28th September 1908. It gave the judgment debtor six months to pay the amount of the decree: consequently the decree-holder could have executed the decree only after the 28th March 1909. On the 1st January 1909, the new Code of Civil Procedure came into force. Order XXXIV of the Code enacted new rules of procedure for the execution of mortgage-decrees. Against the decree of the first Court, the decree holder appealed first to the District Judge and then to this Court. The final decree on second appeal was passed on the 29th July 1910. An application for execution was presented on the 18th of July 1913, that is, within three years of the final appellate decree. The present application was made on the 19th August 1914 for a decree absolute. It was objected to by the defendant that this application was barred by time. The Subordinate Judge disallowed the objection and granted execution. Hence the appeal.

The first point taken by Mr. V. Ramadoss is that the Article applicable to the application is 181 of the Limitation Act and not Article 182. We think he is right. Mr. Somayya contended that as on the date of the Munsif's decree, the new Code had not come into force and as it was well settled under the Transfer of Property Act that applications for orders absolute were governed by Art. 182, his client was entitled to apply for the order absolute as if he were presenting an execution application. The point is one of first impression, but we think, after consideration, that the contention is not well founded. On the date the right to apply for an order absolute accrued, the new code was in force and in matters of adjective law the rules of procedure which are in force at the date the right to apply accrues, would govern all the applications. We think, therefore, that the application was governed by Art. 181 and not by Art. 182. The decision in *Hussain* v. *Karim* [1] is not against this view. In that case, the right to apply had accrued under the Transfer of Property Act and the earlier applications were all made under the said Act. It was held following *Abdul Majid* v. *Jawahir Lal* [2], that such

1. (1915) I. L. R. 39 M. 544. 2. (1913) I. L. R. 36 A. 350.

Nimmala Mahankali v. Kallakuri Seetharamiah.

applications were in execution and that the decree holder having acquired a right to apply in a particular manner under the Transfer of Property Act, that right was not taken away by the provisions of Order XXXIV. That decision is not applicable to a case where a right accrues for the first time under the new Code which has provided a complete remedy for such application. The decisions in *Lakshmi Achi* v. *Subbarama Ayyar* [1], *Beni Singh* v. *Berhamdeo Singh* [2] and *Madho Ram* v. *Nihal Singh* [3] support this position, although the learned Judges in some of these cases have held that even under the Transfer of Property Act, the application should have been under Art. 181 of the Limitation Act.

The next point for consideration is whether under Art. 181 of the Limitation Act, the time begins to run from the date fixed in the original decree for payment or from the date of the decree in second appeal. The decisions are practically unanimous that where the appellate decree confirms the decree of the first Court and is silent regarding the time fixed for payment by the court of first instance, a further period would not be given for payment from the date of the appeal decree. *Ramasami Kone* v. *Sundara Kone* [4] and *Thathara Nannabha Chetty* v. *Cuppal Krishnammal* [5]. A further proposition follows from these judgments namely, that the party in default is not entitled to reckon the time from the date of the appellate decree. The position of a party who is not bound to perform any act under the decree but who appeals to get a larger benefit than what the first court's decree granted him is not covered by any direct authority. The principle applicable to such cases is that ordinarily the decree executable is the decree in appeal. (See *Manavikraman* v. *Unniappan*, [6]) : and if the decree holder has not disobeyed any directions given by the first court, he would be entitled to reckon the period in his favour from the date of the appellate decree. The observations of Benson and Wallis, JJ. in *Ramasami Kone* v. *Sundara Kone*, [4] lend support to this proposition and we think it is sound in principle and is in consonance with justice. We are therefore of opinion that even under Art. 181, the right to apply accrued to the respondent only on the passing of the decree in second appeal. It was conceded that if time

1. (1915) I. L. R. 39 M. 488.
2. (1915) 19 C. W. N. 478.
3. (1915) I. L. R. 38 A. 21.
4. (1907) I. L. R. 31 M. 28.
5. (1912) 16 I. C. 799.
6. (1891) I. L. R. 15 M. 170.

accrued from the date of the appellate decree, the present application would not be barred by Limitation. We must therefore hold that the order of the Subordinate Judge is right and dismiss the appeal. Each party will bear his own costs in this Court.

Nimmala Mahankali v. Kallakuri Seetharamiah.

A. V. V.

PRIVY COUNCIL.

Present:—The Lord Chancellor (Lord Buckmaster) Lord Atkinson, Lord Wrenbury and Mr. Ameer Ali.

[On Appeal from the High Court of Judicature at Fert William.]

Deonandan Prashad Singh ... *Appellant* *

v.

Ramdhari Chowdhri and others ... *Respondents.*

Deonandan **Prashad** Singh *v.* Ramdhari Chowdhri.

Mahomedan Law—Pre-emption—Date from which title passes to pre-emptor—Mesne profits belong to original purchaser till purchase money is paid in full by pre-emptor—Code of Civil Procedure, (Act XIV *of* 1882) *S.* 214.

A person claiming an order of pre-emption cannot be regarded in the same light as an ordinary purchaser of on estate. His right is, when an estate has been sold, to acquire the property from the purchaser at the price paid. If the necessary formalities are observed, and the purchaser assents to the claim, possession is given by mutual consent, but if the claim be disputed and suit must be brought, the rights of the parties are regulated by the Code of Civil Procedure, which in this respect embodies the principle of the Mahomedan Law.

It therefore follows that where a suit is brought it is on payment of the purchase money on the specified date that the plaintiff obtains possession of the property, and until that time, the original purchaser retains possession and is entitled to the rents and profits. It is only when the terms of the decree are fulfilled and enforced that the persons having the right of pre-emption become owners of the property. Such ownership does not vest from the date of sale: the actual substitution of the owner of the pre-empted property dates with possession under the decree.

In this case, the first court gave a decree pre-emption to the plaintiffs on their paying Rs. 27,000 the consideration found by the court to have actually passed for the sale in favour of the deft. On appeal, the High Court dismissed the suit on the ground that the necessary formalities had not been gone through. The Privy Council reversed the judgment of the High Court disagreeing from the High Court as to the formalities but as they found that the consideration for the sale was Rs 44,850 directed that amount to be paid as the price of pre-emption. The amount was paid and possession was taken by the plaintiffs in pursuance of the Privy Council decision. Pending the appeal to the High Court, plaintiffs had taken out execution and got possession which was restored to the defendant on the passing of the High Court judgment. Plaintiffs contended that they were entitled to mesne profiits from the date of their original taking possession *Held* that they were not, as their ownership of the property dated only from their taking possession under the Privy Council decree.

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* 10th November 1916 and 11th December 1916.

Deonandan Prashad Singh v. Ramdhari Chowdhri.

Appeals from two decrees of the Calcutta High Court, dated February 25, 1910 affirming in part and reversing in part a decree of the Subordinate Judge, Monghyr.

The facts of the case sufficiently appear from their Lordships' judgment. On June 30, 1898 two suits of pre-emption were instituted by the predecessors of Deonandan and Baijnath respectively, each claiming one half of Taluka Rasulpur Bhatowni. Plaintiffs alleged that the true sale consideration was Rs. 37,000, though Rs. 44,850 was shown in the sale deed. The Sub-Judge found this question in their favour, and gave each of them a decree for pre-emption for one half on payment into Court within one month of decree of Rs. 18,500. These moneys were duly deposited and on July 19, 1900 plaintiffs took possession. On Appeal the High Court decided that the true sale consideration was Rs. 44,850: further, that plaintiffs were not entitled to pre-empt, inasmuch as the ceremonies necessary under Mahomedan Law had not been performed. They dismissed the suits, and in execution of their decrees the pre-emptors were dispossessed on July 20, 1904. The plaintiffs appealed to the Privy Council, which held that they had the right to pre-empt but agreed with the High Court that the true consideration was Rs. 44,850. The material part of the Order in Council is cited in their Lordships' judgment.

Under this order the pre-emptors deposited a further sum of Rs. 7,850 and were restored to possession on January 19, 1909. Both sides then applied to the Subordinate Judge, the pre-emptors claiming mesne profits from July 20, 1904 to January 19, 1909, while Ramdhari Chowdhri (the original purchaser) claimed mesne profits from July 19, 1900 to July 20, 1904. The Sub-Judge allowed Ramdhari's claim and rejected that of the pre-emptors. On appeal the High Court (Brett and Sharfuddin, JJ.) held that neither party was entitled to mesne profits and dismissed both applications. The material part of their judgment was as follows :—

We think that, in ordering restitution, it would be inequitable and impossible for us to follow strictly the provisions of Section 144 of the new Code of Civil Procedure. It is impossible in our opinion, to say on the facts before us that the four years' possession by the present appellants, under the decrees of the Court of First Instance or the five years' possession by the

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Chowdhris under the decrees of this Court, was wholly wrongful so as to entitle the other party to recover mesne profits from them for those periods. Nor was the possession of either of the two opposing parties wholly rightful. The result, however, has been, so far as the defendants, the Chowdhris, are concerned, that they have lost the interest on the price of the money which they have paid for nine years and they have been in possession of the property for five years. On the other hand, the plaintiffs, Babu Baijnath Goenka and Babu Deonandan Prashad, have lost interest on Rs. 37,000 for nine years, and have been in possession of the property for four years. In our opinion, the course which we ought to adopt in this case as most in accordance with fairness and equity is to try and see that each party is placed in the same position as he would have been if the period from the 19th July 1900 to the 19th January 1909 could be eliminated, or, in other words, to equalise the losses which each party has sustained.

"We have already stated what the losses and profits of each during that period have been. The proportionate losses may be calculated with regard to the capital sum on which during the nine years the opposing parties have lost the interest, and we think that they may be roughly fixed between the appellants and the Chowdhris in the proportion of 4 to 5. The periods during which they have held possession of the property have been in the same proportion. We think it would, in this case, be only fair and equitable to take the profits realised during the periods of possession a fair compensation for the loss of interest sustained and, as the proportions of the losses and the profits are the same, we think that, in these circumstances the applications of both parties for mesne profits should be dismissed and that we should hold that both parties have received sufficient restitution for the loss which they have sustained by the enjoyment of the mesne profits for the periods during which they were in possession.

"We may observe that, in our opinion, substantially the same result would follow any attempt to give restitution to either of the parties under the provisions of S. 144 of the Code of Civil Procedure. The right to mesne profits by want of restitution would be subject to the liability in the case of the present appellants to pay interest to the respondents on the sum of Rs. 44,850 for nine years, and in the case of the respondents to pay interest to the Appellants on the sum of Rs. 37,000 for the same period.

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In each case, the sum to be paid and received would be substantially equal and may fairly be set-off the one against the other."

"We accordingly modify the decree of the Lower Court by setting aside the decree for mesne profits passed in favour of the Chowdhris and confirming the order of dismissal of the applications of the plaintiffs for mesne profits. The result, therefore, is that appeals Nos. 537 and 538 are decreed and appeals Nos. 365 and 366 are dismissed. Having regard to the conclusion at which we have arrived, we direct that each party do bear his own costs in both the Courts."

The appellants are entitled to a refund of the Court-fees paid on the two memoranda of appeals which have been dismissed."

Hence these appeals.

De Gruyther, K. C. and *B. Dube* for the Appellants. The question is under the Mahomedan Law as administered in British India, from what date the title passed to the pre-emptor. The Sub-Judge, on consideration of Mahomedan Law, has decided against us: the High Court, on general principles, has found that both parties have suffered some loss and set off one claim against the other.

(*The Lord Chancellor*: If the Sub-Judge had found in the first instance that Rs. 44,000 was the figure, the only difference would have been that Rs. 7,000 more would have been locked up, and no one could have questioned your right to mesne profits.)

Under Indian Law the title passes from the date of payment —the present law is Act V of 1908, Order 20, rule 14. In this respect the Civil Procedure Code merely gave statutory recognition to the existing Mahomedan Law--Baillie's Mahomedan Law, p. 550. The title passed to us before July 1900: it passed from the date of payment of the price adjudged by the Subordinate Judge and has remained in us throughout. The respondents were merely in the position of an unpaid vendor.

A. M. Dunne for Respondents: The pre-emptors had no right to get possession of the property without paying the whole price. The law of pre-emption must be strictly interpreted. The case is governed by S. 214 of Act XIV of 1882 the Civil Procedure Code then in force. Under that section the Court must specify a day on or before which the purchase money shall be paid and the decree shall declare that on payment of such purchase money the pre-emptors shall obtain possession. The

pre-emptor acquires title on payment of the purchase money and not before. The Order in Council varied the original decree and the effect of that order was that a day was to be fixed on which the pre-emptors were to pay the purchase money. The rights of ownership vest in the pre-emptor from the date of payment in accordance with the final decree. *Deokinandan* v. *Sri Ram* [1] The Subordinate Judge's decision on the point of law is correct: the High Court have erroneously applied general principles of rough justice.

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De Gruyther, K. C., in reply. The right of pre-emption is not a right of repurchase either from vendor or vendee, involving any new contract of sale, but simply a right of substitution entitling the pre-emptor to stand in the shoes of the vendee. *Goonid Dayal* v. *Inayutullah* [2]. The Privy Council merely did what the High Court ought to have done. The whole litigation is due to respondents' refusal to take the Rs. 44,850 when we offered it to them.

Their Lordships' judgment was delivered (December 11, 1916) by

Lord Buckmaster L. C.

The Lord Chancellor.—The question in these appeals affects the right to mesne profits of certain lands which, by virtue of three different sets of judgments—*first*, two decrees of the Subordinate Judge on the 31st March, 1900; *secondly*, two decrees of the High Court at Calcutta on the 20th January, 1904; and *thirdly*, an Order in Council on the 25th January, 1908—have been alternately in the possession of Deonandan Prashad Singh and Baijnath Ram Goenka or their predecessors in title (hereafter, for convenience, called the appellants), Ramdhari Chowdhri and others or their predecessors in title (hereafter called the respondents), and, finally, of the appellants again. The explanation of this changing occupation is to be found in the nature of the proceedings in which those orders were made.

On the 30th June, 1898, two suits were brought by the two predecessors of the appellants each claiming a right to pre-empt a half share in certain property known as Taluka Rasulpur Bhatowni, which, on the 17th December, 1897, one Anupbati Koeri sold to Nirbhoy Chowdhri. The sale was alleged by the purchaser to have been made for 44,850 rupees, and this amount

1. (1889) I. L. R. 12 A. 234, 236. 2. (1885) I. L. R. 7 A. 775, 809. (F. B.

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was stated as the consideration in the deed of sale. The plaintiff's right to pre-empt does not seem to have been questioned; the only matter in dispute was whether they had made, in accordance with the rules of the Mahommedan law to which the right is subject, the "demands," which are a condition precedent to the exercise of the rights of pre-emption. The plaintiffs alleged they had duly performed the necessary formalities and also that they had offered to pay the full purchase price. The purchaser, however, declined to recognise their rights, and it accordingly became necessary to institute proceedings. Unfortunately, in those proceedings, the plaintiffs challenged the reality of the purchase price named in the deed, and alleged that the real purchase price was 37,000 Rupees, and not 44,850. The defendant denied the right of pre-emption, and asserted that the full consideration was the true consideration for sale. The plaintiffs succeeded on both their contentions, and, by the decrees of the 31st March, 1900, to which reference has been made, the Subordinate Judge ordered that each of the plaintiffs should, within one month from the date thereof, deposit in the Court 18,500 Rupees—half of the 37,000 Rupees the price of the property claimed, and then be awarded possession of the half share of the property claimed by right of pre-emption. The money was duly paid by both the plaintiffs, and possession of the estate was delivered to them on the 19th July, 1900.

The judgment of the High Court reversed this judgment and set aside these decrees, declaring that there was no right of pre-emption, and that the full consideration for the sale was 44,500 Rupees. Possession of the estate was accordingly re-delivered to the original purchaser on the 20th July 1904.

The Order of the Privy Council on appeal from the High Court was dated the 25th January, 1908; this declared that the right of pre-emption existed, and that the purchase price was that stated in the deed; accordingly the decrees of the High Court were discharged, and it was further ordered that the decrees of the Subordinate Judge should :—

"........be varied by calculating the price of pre-emption on the sum of 44,850 Rupees instead of on the sum of 37,000 Rupees and by ordering the amounts in question to be deposited by the respective appellants in the Court of the said Subordinate Judge within such times as the said High Court or the Court of the said Subordinate Judge may determine that subject to these variations and the payment to the appellants of additional costs (if any) properly incurred by them,

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the said decrees of the Court of the said Subordinate Judge be and the same are hereby remitted to the said High Court in order that the necessary steps may be taken for the disposal thereof on the above footing."

It appears that during all this time the two sums of 18,500 Rupees had remained in Court, uninvested as the appellants suggest, though their Lordships cannot but think it unlikely that so large a sum should be left idle during the whole long and indeterminate time of Indian litigation. Accordingly the plaintiffs were only bound to find the balance of 7,850 Rupees, and this having been done the plaintiffs were restored to possession on the 19th January, 1909.

In working out the Order in Council, a question has naturally arisen as to the right to mesne profits between the 19th July, 1900, and the 19th January, 1909. The respondents, as representing the original purchaser, claim to be entitled to the whole mesne profits between these dates upon the ground that the appellants are only in possession under the Order in Council. The appellants, on the other hand, assert their right because they urge they were rightly in possession under the original decrees, and that that possession was wrongfully taken away by the order of the High Court. The High Court, from whom the present appeal has been brought, have settled the matter by giving mesne profits during the one period to the appellants, and during the other period to the respondents. But though this order might be a fair way of adjusting the rival claims of the parties were they uncontrolled by statute, their Lordships are unable to find that they are free to deal with it in this manner.

A person claiming an order of pre-emption cannot be regarded in the same light as an ordinary purchaser of an estate. His right is, when an estate has been sold, to acquire the property from the purchaser at the price paid. If the necessary formalities are observed, and the purchaser assents to the claim, possession is given by mutual consent and no difficulty arises; but if the claim be disputed and suit must be brought, the rights of the parties are regulated by the Code of Civil Procedure, which in this respect embodies the principle of the Mahommedan law. S. 214 of the Code of 1882 is in these words:—

"214. When the suit is to enforce a right of pre-emption in respect of a particular sale of property, and the Court finds for the plaintiff, if the amount of purchase-money has not been paid into Court the decree shall specify a day on or before which it shall be so paid, and shall declare that on payment of such

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purchase-money, together with the costs (if any) decreed against him, the plaintiff shall obtain possession of the property, but that if such money and costs are not so paid the suit shall stand dismissed with costs."

It therefore follows that where a suit is brought it is on payment of the purchase money on the specified date that the plaintiff obtains possession of the property, and, until that time, the original purchaser retains possession and is entitled to the rents and profits. This was so held in the case of *Deokinandan* v. *Sri Ram*, [1] and there Mr. Justice Mahmud, whose authority is well recognised by all, stated that it was only when the terms of the decree were fulfilled and enforced that the persons having the right of pre-emption become owners of the property, that such ownership did not vest from the date of sale, notwithstanding success in the suit, and that the actual substitution of the owner of the pre-empted property dates with possession under the decree.

Now, in the present case, the decrees under which possession was given of the pre-empted property are the decrees of the Subordinate Judge, not, indeed, those of the 31st March, 1900, but those decrees as varied by the Order in Council of the 25th day of January 1908, for at that date the original decrees of the Subordinate Judge had been set aside, and were only restored upon the terms mentioned in the judgment of the Privy Council. So varied, they provided that upon the deposit by each plaintiff of 22,425 Rupees—half of the 44,850 Rupees—he should then be awarded possession. Until that deposit was made possession could not be taken. If it had not been made, possession could never have been assumed at all, and, in their Lordships' opinion, it follows that the plaintiffs only obtained possession within the meaning of the Code in pursuance of that order, that is to say on the 19th January, 1909.

Their Lordships fear that this opinion, to which they are compelled by the terms of the Code, may involve some hardship upon the plaintiffs; but it must be remembered that this is due to two matters, one of which was wholly and the other to some extent under the plaintiffs' control. The first and the fundamental error was in challenging the consideration for the sale. Apart from this, their possession would have been lawful throughout, and the Order in Council would merely have confirmed the decrees of the Subordinate Judge and prevented the decree of the

1. (1889) I. L. R. 12 All. 234.

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High Court from having any effect. But, apart from this, their loss might have been materially lessened had they proceeded with diligence in their appeal from the judgment of the High Court. This was given on the 21st January, 1904, and it was not till four years afterwards that the matter came before the Judicial Committee for decision, though there need be no delay in the hearing of appeals when once they are entered here. The 30th June, 1898, was the date when proceedings were commenced, and it is not until nearly ten years afterwards that the final decree is obtained. Their Lordships realise and desire to make full allowance for the difficulties due to translation of documents, printing, and preparation of the record, and all the circumstances attaching to habits and ideas different from their own; but delay in litigation means to every one concerned, in whatever country he may be, needless expense, anxiety, and disappointment, and to the poor and honest suitor it is an oppression hard to be borne.

In the result, therefore, the appellants fail and the respondents succeed. Their Lordships will therefore humbly advise His Majesty that the two decrees of the High Court, both dated the 25th February, 1910, made in Appeals Nos. 365 and 366 of 1909, should be affirmed, and that the two decrees of the High Court, both dated the 25th February, 1910, made in Appeals Nos. 537 and 538 of 1909, should be set aside except as to costs, and that the decrees of the Court of the Subordinate Judge dated the 28th August, 1909, should be restored except as to costs. It follows that the appellants' appeals should be dismissed and the respondents' cross-appeals allowed. As regards costs, the High Court ordered each party to bear their own costs in both the Indian courts. This part of the High Court's order will not be disturbed, and there will be no costs in these appeals.

Watkins and Hunter :—Solicitors for appellants.

T. L. Wilson and Co. :—Solicitors for respondents.

A. P. P.

PRIVY COUNCIL.

Present :—Lord Parker of Waddington, Lord Sumner and Sir Lawrence Jenkins.

[On Appeal from the High Court of Judicature for the North Western Provinces, Allahabad.]

Moti Lal and others ... *Appellants* *

v.

Kundan Lal and another ... *Respondents.*

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Discovery—Account Books —Failure to produce and account for them—Presumption.

Where it is the business of a party to a suit to produce or account for books of account relevant to an issue, and, in spite of an order for discovery made on the party, he neither produces them nor gives any evidence of diligent search and of failure to find the books, even if the fact and date of their destruction, cannot be proved, the presumption arises that the contents of the books not accounted for are, as regards the issue in dispute, unfavourable to that party.

Appeal against a decree of the High Court at Allahabad (December 5, 1912) reversing a decree of the Court of the Additional Subordinate Judge of Cawnpore (August 2, 1909).

The facts of the case are fully stated in the Judgment of their Lordships. The suit was brought by the respondents against the Appellants to recover from the latter a 12 annas share in a mouza called Hansi Mau. The Subordinate Judge dismissed the suit, but the High Court decreed it, and the defendants-appellants thereupon appealed to His Majesty in Council.

De Gruyther, K. C., and *J. M. Parikh* and *J. K. Roy*, for the appellants, submitted that the decision of the Subordinate Judge was right. They referred to *Tekait Doorga Persad Singh* v. *Tekaitni Doorga Kunwari* [1] and *Sham Koer* v. *Dal Koer* [2].

Dube for the Respondents, supported the decision of the High Court, and during the course of the argument referred to *Rewa Prasad Sukal* v. *Deo Dutt Ram Sukal* [3] and the Code of Civil Procedure 1882, (Act 14 of 1882), Ss. 394 and 395.

No reply was called upon.

The judgment of their Lordships was delivered by

Lord Sumner.

Lord Sumner.—In this case the plaintiffs sued to recover proprietary possession with mesne profits of a 12-anna share in Mouza Hansi Mau, in the district of Cawnpore. They are members of a joint Hindu family, the Tewaris, governed by

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* 1917 January, 23.

1. (1878) L. R. 5 I. A. 149 at p. 157. 2. (1902) L. R. 29 I. A. 132.
3. (1899) L. R. 27 I. A. 39, at p. 41.

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Mitakshara law, and claim this mouza as part of their undivided property. The circumstances are such that the plaintiffs' right, if any, has not been barred by adverse possession and lapse of time. It is convenient to speak of one defendant, Suraj Kunwar though there are others, his vendees. The property is small; it seems to yield 500 rupees per annum, but it has been fought for at prodigious length and cost.

In the first instance the burden of proof was on the plaintiffs, but they produced a conveyance, dated the 3rd August 1863, under which the property in question was conveyed on sale to Musammat Babbo Kunwar, guardian of her son Suraj Parshad, then a minor, both being members of the Tewari family. There was also evidence that the purchase consideration was provided out of joint funds. The rights of Suraj Parshad, have now decended to the plaintiffs, and it is not contended that Musammat Babbo Kunwar took any interest for herself. The defendant produced no conveyance in his own favour, but claimed that the purchase of 1863 was in truth a *benami* transaction for the separate benefit of his wife, to whose rights he succeeded when she died in 1871. Thus the burden of proof passed to the defendant very early in the case.

His story was this. At the age of 8 or 9 years he was married to his wife, Musammat Sheorani Kunwar, who was about 3 years older. His "elders consented to this marriage from avaricious motives, " and so he went to live thenceforward in his wife's father's house. Basti Ram, his father-in-law, died in 1860. In his later years he had lived a disreputable and extravagant life, and, as he neared his end, he was minded and entitled to make reasonable provision for his daughter out of family funds. The family wealth would pass to her brother, Suraj Parshad, and the family into which she had married, though "Kanaujia Brahmans of a superior grade," were poor. Suraj Kunwar testified that he recollected how Basti Ram, less than three months before he died, on the same day that he performed "gausat-dan" gave to Musammat Sheorani in his presence gold mohurs to the value of 10,000 Rupees saying to his wife, Musammat Babbo Kunwar, "You can purchase some village worth 10,000 Rupees for our daughter." Suraj Kunwar was then a little over 13. He also called as a witness a friend, who, as a boy of 10, and an inmate of the household,

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remembered, or said that he remembered, this scene. What might well impress the husband of 13 was a more dubious matter in the recollection of his friend of 10.

Mouza Hansi Mau then belonged to one Ghazi Ram as his zamindari property. It was already in mortgage to Musammat Babbo Kunwar and two other ladies of the Tewari family, and 6,000 Rupees out of the 10,000 Rupees were invested upon a mortgage, of it, partly by discharging the amount due on the old mortgage, partly by fresh advances. The new mortgages were dated in 1861 and 1862 and were in the names of Musammat Babbo Kunwar and her minor son, Suraj Parshad. The disappearance of the names of the other two ladies is used as an argument for saying that the transaction in question was not a joint family transaction. On the other hand, the fact that Musammat Babbo Kunwar was a party to these instruments as guardian of Suraj Parshad certainly points strongly the other way. Finally, on the 3rd August, 1863, the property was purchased, also in her name, for 7,660 Rupees, the consideration being satisfied by discharging the principal and interest due on the prior mortgages. Musammat Babbo Kunwar's name, according to Suraj Kunwar, was inserted instead of her own at Musammat Sheorani's request. It was a *benami* transaction. Admittedly, until Musammat Babbo Kunwar died in 1890, ten years after her son, Suraj Parshad, the property was registered for Revenue purposes in her name, and only then was mutation into his own name applied for and obtained by Suraj Kunwar. He said that his wife, Musammat Sheorani, regularly received the income till she died, and that he continued to receive it from her death onwards.

If this story was accepted, the defendant had discharged the burden of proof, and had established that the transactions of 1860 to 1863 were *benami* transactions, to the benefit of which he was entitled. The answer to it was a point-blank denial. He was examined and cross-examined day after day at great length, and the Trial Judge unhesitatingly believed him. On appeal his story was rejected as unworthy of belief, and judgment was entered for the plaintiffs. Hence the present appeal. The learned Judges of the High Court proceeded on the ground that the story was absurd, and that although, in spite of its inherent

improbability, the Trial Judge accepted it, this was only because he threw on the plaintiffs the burden of showing that Mouza Hansi Mau was not acquired *benami* for Musammat Sheorani. They held that such documentary corroboration as was produced was either unsatisfactory or corroborated the opposite case, and that the conduct and, apparently, the character of Suraj Kunwar were both suspicious and open to censure.

It is true that the learned Trial Judge did say that the story was absurd, but the very sentence quoted by the Judges of the High Court shows his meaning, *viz.*, "this story, with its bare nakedness and without any external support, seems improbable and absurd." It certainly was a story, which in itself alleged and involved the existence of corroborative material, and if that was not forthcoming, in so far as Suraj Kunwar could produce it, the story might well seem to be a hardy and palpable fabrication. Intrinsically, however, it was not inconsistent with human nature or the practice and sentiment of Hindu families. It has commended itself, as such, to other Judges beside the learned Judge who tried the case. About 1900 those then acting in the present plaintiffs' interest quarrelled with Suraj Kunwar, and turned him bodily out of the family house, where he had lived, man and boy, for nearly fifty years. They then went to law with him. They sued him for possession of three mouzas, variously called Ratharwa, Chhounki, and Kuihouli, and Kherwa, Jhunki, and Khijauli, which they alleged were the property of the Tewari family, and which he said were his own. In that suit he told the same story, and, although they then laid no claim to Mouza Hansi Mau, he made it an integral part of his case. On that occasion also the Trial Judge believed him, and his judgment was affirmed on appeal. It was only after this failure that the plaintiffs brought the present suit for Hansi Mau.

As has been said, the Tewari family was rich. It owned a large zemindari ilaka. There was an old-established money-lending business. There were dealings in grain and in precious metals. The various transactions were recorded in minute detail in books of account as voluminous and complicated as the transactions themselves. Therein were to be found the various rents collected from ryots and the profits drawn from "sir" lands. Sums were entered ranging from hundreds of rupees to trivial amounts; there were entries of purchases of gold mohurs coined

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by many dynasties and of the expenditure of a few pence for sugar candy and a few pice for salt. The family had at least three shops, one at Pukhrayan and two in Cawnpore, the deorhi shop and the chouk shop. At Pukhrayan rents were collected, among others the rent of Hansi Mau. It was a subordinate establishment, and after deduction of its expenditure its takings were sent to one or other of the Cawnpore shops. With these books and these dealings the defendant was familiar. After Suraj Parshad came of age he employed Suraj Kunwar for some years as a karinda at Pukhrayan. When he died the family affairs passed into the hands of three purdahnashin ladies, Musammat Baboo Kunwar, his mother; Musammat Mithan Kunwar, his widow, who lived till 1898; and Musammat Dilaso Bibi, wife of his son Sitla Parshad, who died a minor in 1887. With these ladies Suraj Kunwar, long regarded as one of the family, stood in high favour. He became their sarbarakhar, held their power of attorney, and no doubt had much influence with them and in the management of all the family affairs.

Insignificant though the income of Hansa Mau was as compared with the whole Tewari income, it is impossible that it should have found no place in the family books of account. It was collected by the Tewari karindas at Pukhrayan and entered in the books there under the name of the mouza. It was then remitted to Cawnpore. Somehow or other the Cawnpore books must have dealt with it also. If it belonged to the joint family it stood as a receipt in the Pukhrayan books, and the Pukhrayan shop had to discharge itself. In the Pukhrayan books, accordingly there were entries showing the remittances sent to Cawnpore, either separately or aggregated with other cash. The Cawnpore books in turn must have shown whether it was separately paid away for or to the use of individuals, or was treated as an item in the general family cash and included in its totals. Somehow this income, like other remittances, had to be accounted for. It is true that the business seems to have been carried on unmethodically, and the books were neither regularly kept nor regularly balanced, but they served their turn, and must have been capable of throwing much contemporary light, one way or the other, on the truth of Suraj Kunwar's story about Hansa Mau.

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For a long and important period the books were forthcoming. They were examined before the trial by a commissioner, who, it is to be hoped, understood his report better than anyone else has been able to do. Many bullock-loads of account books were in the court compound at the trial, and at any rate a sufficiency of them were made available on the appeal. Selected entries were examined and explained in the evidence. Many, though not all, of them have been printed in the record. Some are clear and some are not. Assisted by copious and careful argument by counsel on both sides, their Lordships have done their best with them.

Unfortunately these books only begin about 1872. For the previous nine years they are not produced, and it was the plaintiffs' business to produce or account for them. When Suraj Kunwar ceased to be sarbarakhar and was turned out of the house, he left the family archives behind him. He says, though probably he exaggerates, that he was then too ill to walk unaided and was not even allowed to take away his own papers. At any rate, at that time the plaintiffs, or those acting in their interest, must have come into possession of the business books of the Tewaris, whatever they were. An order for discovery was made upon the plaintiffs in this suit, but they produced none older than 1872. It may well be that the earlier books have been destroyed or have perished, but it was incumbent on the plaintiffs, and it would have been easy, to have given evidence of diligent search and of failure to find them, even if the fact and date of their destruction could not be proved. Such books must have existed, and must have been long preserved for business purposes. Nor is this matter one of mere mistake or oversight. In the earlier suit for possession of the three mouzas, the same course was taken by the plaintiffs, and the comments made on it by the Court were severe. On the repetition of it in the present suit, two consequences followed. Secondary evidence of their contents was let in, and such evidence Suraj Kunwar gave. He said that his wife Musammat Sheorani, always had the Hansi Mau profits paid to her or paid away by her direction, and that she had an account which was kept in the books of the chouk shop at Cawnpore. Next the presumption arises that the contents of the Tewari family books, which were not accounted for, were, as regards the issues in dispute, unfavourable to the plaintiffs. That could only

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be because they favoured Suraj Kunwar and supported his story. So far there is ground for saying that the learned Trial Judge was warranted in accepting his evidence. The High Court hardly seems to have appreciated this view of the matter.

The learned Judges seem to have thought that the question was, "Who made away with these books?" and that it was disposed of by acquitting the plaintiffs. To be sure, they say that they do not find Suraj Kunwar guilty, but as they add that he had the opportunity of getting rid of them if he chose to do so, they leave him under suspicion of misconduct entirely without evidence. Indeed, if Suraj Kunwar wished to suppress the facts and prepare the ground for an audacious fiction, he would not have spirited away the whole of the books before 1872 and spared all those of later date. He would have confined his attention to eliminating or improving the relatively scanty entries relating to Hansa Mau.

Their Lordships have carefully considered the portions of the books produced, to which their attention was directed, and they are of opinion that, so far as they go, they tend to support Suraj Kunwar's story. It would be an unprofitable task, as it certainly would be a tedious one, to set out the details of these accounts at length. There are a few entries in the books of the Pukhrayan shop showing that the net proceeds of the Hansa Mau rents were taken to Cawnpore by Suraj Kunwar in the lifetime of Suraj Parshad. Suraj Kunwar said that they were his own moneys and were so treated by him nor is there any entry produced from the Cawnpore books to show that on the contrary they were treated as part of the family funds. It is true that these entries by no means occur in every year, and that in the years in which they do not appear there is not, as might have been expected, credit of such sums to the personal account of Suraj Kunwar kept in the books of the Pukhrayan shop. It is noticeable also, and is unexplained, that in, at any rate, one instance a similar entry appears in connection with another mouza, mouza Umrán, with which the defendant does not claim to have had anything to do. Still, unless Suraj Kunwar was merely the carrier of these moneys to Cawnpore, in which case the Cawnpore books must have credited them to Pukhrayan as remittances on the family account, these entries, such as they are, were an open assertion of right by Suraj Kunwar, which might naturally have

been expected to have challenged enquiry and even litigation by Suraj Parshad. In the absence of any evidence of such challenge, these entries again tend to corroborate the defendant's story and are inconsistent with the plaintiffs' right.

Suraj Kunwar further produced, in support of his case, two Sarkhats, one stating an account from 1864 to 1869, when Musammat Sheorani died, and the other, in continuation of it, running from 1869 to 1871. They purported to relate to the income of Hansi Mau on the credit side, and showed entries on the debit side of sums "sent to Katharwa," the village where the family of Suraj Kunwar lived; some purchases of jewellery, some losses in grain and cotton businesses, outlays for Musammat Sheorani's "dashah" ceremony, outlays on the occasion of her 'barsi," and other sums. The judgment of the High Court disposes of these sarkhats as "most suspicious," apparently because they are not entries in a book but are written on separate sheets of paper, and says that they could easily have been fabricated. This may be so, but the uncontradicted evidence is that the first is wholly and the second partly in the handwriting of a man, who died in 1874, and, if he fabricated them with a view to their employment at a trial in 1909, Suraj Kunwar's case displays a foresight and care in its preparation which is remarkable even in Indian litigation. Again, the defendant explained these entries of moneys "sent to Katharwa" by saying that his wife settled 5 bighas in Hansi Mau upon his family, which is not borne out by any document and is inconsistent with his having sold to his co-defendants the entire 12-annas share without reservation. . Still their Lordships are not satisfied that these sarkhats, though they may deserve to be regarded with suspicion, ought to be disregarded altogether. So far as they go, though they are not very clear, they support the case of Suraj Kunwar, and are certainly inconsistent with that of the plaintiffs.

There were three occasions on which the conduct of those then entitled to the family property or employed in the family interest, was inconsistent with any knowledge or belief on their part that Hansi Mau could be claimed as family property, though, if it had been so treated since its acquisition, these persons could hardly have been ignorant of the fact.

When Suraj Parshad came of age he found that the mouzas belonging to the family stood in the names of his mother,

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Musammat Babbo Kunwar, and of two other ladies of the family. He claimed that he was entitled to mutation, sued to establish his right of succession and ownership under Hindu law and succeeded. Though keenly alive to his rights he made no claim to Hansi Mau. His mother's name stood on the khewat of Hansi Mau as pattidar and lambardar as long as he lived to the knowledge, at any rate, of his attorney, and so remained till she died long after him. Again, after those who represent the present plaintiffs had put the defendants out of the house, and certainly must have been minded to oust him from all property to which they conceived the family to be entitled, they brought the prior suit, already mentioned, to recover possession of three other mouzas, but made no claim to Hansi Mau, presumably because they then believed that they had no claim. Lastly, when Musammat Babbo Kunwar died, Suraj Kunwar claimed mutation of Mouza Hansi Mau into his own name. He supported this claim by producing a taliknama, executed by Mussammat Mithan Kunwar and Musammat Dilaso Bibi in which they set out in detail the story which he told at the trial of the present case, and on the strength of this obtained the desired mutation. This document was put in before the Trial Judge. Their Lordships agree with the High Court in thinking that it was of little, if any, value; but one circumstance connected with it is somewhat significant. It was prepared with the knowledge of a certain Adhari Lal, a collateral member of the Tewari family, who in certain events would become personally interested in the family property, and had for some time been in the family employment as a karinda, and held, jointly with the defendant, the ladies' power of attorney. He took no exception either to the statements in or to the use of the taliknama.

Their Lordships are fully alive to the fact that there was much to be said against the case which Suraj Kunwar made, and that persons in his position, who make such claims as he made, must expect their stories to be narrowly, and even sceptically, scrutinised; but the question is not whether their Lordships would have believed his story, had they tried the case, but whether there is sufficient in the evidence to show that the High Court was right in holding that the Trial Judge had misdirected himself as to the onus of proof, or had misjudged the weight of the evidence, or wrongly accredited certain of the witnesses called before him.

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In the result their Lordships answer this question in the negative, and will, therefore, humbly advise His Majesty that the appeal should be allowed, with costs, and that the judgment appealed from should be set aside, with costs, and the decree of the Trial Judge should be restored.

Solicitor for appellants :—*E. Dalgado.*

Solicitors for respondents :—*Borrow Rogers and Neville.*

A. P. P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.
[FULL BENCH.]

Present :—Sir John Wallis, Chief Justice, Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Aiyangar.

Balide Kamayya and others ... *Appellants* in Second Appeal No. 979 of 1914 (Defendants Nos. 2 to 5, 8 and 9).*

v.

Pragada Papayya and another ... *Respondents in Second Appeal No. 979 of 1914 and Appellants in Second Appeal No. 1712 of 1914. (Plaintiffs).*

Civil Procedure Code, S. 107 (2) and O. 23, R. 1—Leave to withdraw with liberty to file fresh suit—Power of appellate court to grant.

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It is open to an appellate court in proper cases when reversing the decree of the lower Court to give the plaintiff leave to withdraw the suit with liberty to file a fresh suit.

Second Appeals against the decree of the Court of the Temporary Subordinate Judge of Ganjam at Berhampore in Appeal Suit No. 163 of 1913, preferred against the decree of the Court of the District Munsif of Sompeta in Original Suit No. 203 of 1912.

The Court (Spencer and Krishnan, JJ.), made the following

ORDER OF REFERENCE TO A FULL BENCH :—

Spencer, J.

Spencer, J. :—Original Suit No. 430 of 1909 on the file of the District Munsif's Court of Sompeta was a suit brought for recovery of possession of certain lands. The suit was dismissed with costs as there was nothing on the record to show how the 1st defendant got title from the purchaser at Court auction and as the plaintiff's only title was that derived from the 1st defendant.

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* S. A. Nos. 979 and 1712 of 1914. 28th November 1916.

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The plaintiffs appealed and the District Judge permitted the appeal to be withdrawn with liberty to bring a fresh suit. As observed by the Subordinate Judge, the granting of permission "to withdraw the appeal" was a clerical error, and we must take it that what the learned District Judge intended was to set aside the decree of the Original Court and to permit the suit to be withdrawn. The appeal was allowed to that extent. The plaintiffs brought a fresh suit, Original Suit No. 203 of 1912 and succeeded generally both in the Original and Appellate Courts.

It is now contended in these appeals that an Appellate Court has no power to allow a suit to be withdrawn with liberty to file a fresh suit. In support of this, the appellants' pleader relies on the decision in *Choragudi China Kotayya* v. *Raja Varadaraja Appa Row* [1] and on the following observation in *Eknath* v. *Ranoji* [2]. "It is clearly, we think, beyond the power of the Court to allow a withdrawal from a suit with leave to file a fresh suit on the same cause of action after the defendant has obtained a decree in his favour". This observation was of the nature of an *obiter dictum* in that case. The correctness of the decision, so far as it decided that before the admission of the appeal the Appellate Court had no power to make an order of this nature, cannot be doubted. In *Afzal Begam* v. *Akbari Khanam* [3] the decision of this Court in *Choragudi China Kotayya* v. *Raja Varadaraja Appa Row* [1] has been considered and dissented from. The learned Judges of the Allahabad High Court followed a previous decision to the same effect in *Ganga Ram* v. *Datta Ram* [4], and they further relied on the practice of the Allahabad Courts to give such a permission even in appeal. In *Veera Reddy* v. *Akka Reddy* [5] Sadasiva Aiyar J, sitting as a single Judge has doubted the correctness of the decision in *Choragudi China Kotayya* v. *Raja Varadaraja Appa Row* [1].

The exercise of this power by virtue of section 107 Cl. (2), Civil Procedure Code (old section 582) by the Appellate Court as a matter of practice is conceded by the learned Judges who decided the case in *Choragudi Chinna Kotayya* v. *Raja Varadaraja Appa Row* [1]. In *Chidambaram Mudali* v. *Kothandavelu Mudali* [6], the power was exercised even in second appeal; but the jurisdiction

1. (1914) 27 M. L. J. 244.
2. (1911) I. L R 35 B 261.
3. (1916) I. L. R. 37 A. 326.
4. (1885) I. L. R. 8 A 82.
5. (1915) 28 I.C. 487.
6. (1912) M. W. N. 1003.

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of the Court to make such an order does not then seem to have been questioned, nor was it questioned in *Jogodindro Nath* v. *Sarut Sundari Debi* [1], in which the practice was recognised. In *Kali* v. *Panchanan* [2], it was held that the fact that the plaintiff was not able to adduce all the evidence which he would have liked to adduce at the first hearing was not a good ground for an Appellate Court permitting the plaintiff to withdraw from the suit and bring a fresh suit and therefore such an order was without jurisdiction. Similarly in *Tirupati* v. *Muthu* [3], it was held that an order passed by an Appellate Court permitting a plaintiff to withdraw his suit with permission to bring a fresh suit was bad if no reasons were assigned for the order.

In the present case, the permission was granted in order to permit the plaintiffs to redraft their plaint in such a manner as to contain certain necessary allegations for indicating more clearly what their father's title was, and this appears to me to be a good ground for the order in the circumstances of this case.

With due respect to the learned Judges, I am unable to follow the reasoning in *Choragudi China Kotayya* v. *Raja Varadaraja Appa Row* [4].

As I understand the judgment, the main arguments are that the language of O. 23 R. 1 is such as to apply only to a pending suit and that after a suit has terminated in a decree, it is not open to any Court to grant the required permission; secondly that if the word "appeal" is substituted for the word "suit", wherever it occurs, the rule will read "at any time after the institution of an appeal the plaintiff * * * may withdraw his appeal", and that this reading will not give the plaintiff the remedy he requires.

The answer to the first objection seems to be that when an appeal has been admitted the whole suit is reopened and there is no certain finality about the decree in existence until the Appellate Court pronounces one.

The second objection is in my opinion, which I hold with due respect, based on a misconception of what section 107 clause 2 lays down.

Subject to certain conditions and limitations it declares that "the Appellate Court shall have the same powers and shall

1. (1891) I. L. R. 18 C. 322.
2. (1916) 23 C. L. J. 489.
3. (1888) I. L. R. 11 M. 322.
4. (1914) 27 M. L. J. 244.

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perform as nearly as may be the same duties as are conferred on and imposed by this Code on Courts of Original Jurisdiction in respect of suits instituted therein."

Rule 11 of Order XXII which says "in the application of this order to appeals, *so far as may be,* the word "plaintiff" shall be held to include an "appellant", the word "defendant," a "respondent," and the word "suit" an "appeal" does not occur in Order XXIII.

Therefore in considering what are the powers of an Appellate Court under Order XXIII, which deals with the withdrawal and adjustment of suits, there is no necessity to go through a strict process of altering the word "suit" into the word "appeal" wherever it occurs.

A comparison of the sections of the old Code dealing with this matter with the provisions of the new Code does however throw light on the question.

Section 375 A which runs thus :—"Nothing in this chapter shall apply to any application or other proceeding in any suit subsequent to the decree," with an explanation attached—"An application to the Appellate Court pending an appeal is not an application subsequent to the decree appealed from within the meaning of this section" was added by Act VI of 1882, S. 2 and has disappeared in the Code of 1908. In its place we have Order 23, Rule 4 "Nothing in this order shall apply to any proceedings in execution of a decree or order."

The explanation to the old section in terms answered the objection that applications to withdraw the suit cannot be made in appeal because they are subsequent to the decree.

It recognized the practice of withdrawing suits with the Court's permission after they have reached the stage of appeal.

The new rule declares that the plaintiff cannot have this privilege when his suit has reached the stage of execution. This rule seems to have been introduced in consequence of the decisions in *Radha* v. *Radha* [1], *Lachmi* v. *Atchanna,* [2] and *Tarachand* v. *Kashinath* [3].

The fact that the exercise of the right when the suit is in the stage of appeal is not expressly negatived favours the theory that what is not expressly withdrawn may be presumed to continue te exist.

1. (1891) I. L. R. 18 C. 515. 2. (1892) I. L. R. 15 M. 240.
3. (1885) I. L. R. 10 B. 62.

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As cases not infrequently occur in which the exercise of the supposed power to withdraw suits with liberty to sue again is attempted, and as the question is of considerable importance, we refer for the decision of a Full Bench the question "whether an Appellate Court has the power for proper reasons to allow a suit to be withdrawn with liberty to file a fresh suit."

Krishnan, J.

Krishnan, J :—I agree to the order of reference to the Full Bench as proposed by my learned brother.

The District Judge's order passed at the hearing of the present respondents' appeal, allowing their suit to be withdrawn with liberty to file a fresh suit must be taken to have in effect set aside the decree of the 1st Court dismissing the suit or annulled it and to have allowed the appeal to that extent though the order does not expressly say so. See the observations of Tyrrell, J. in *Gangu Ram* v. *Data Ram* [1].

The order was passed under Rule 1, Order XXIII read with S. 107, Clause (2) of the new Code, which was in force at the time. The suit now in the second Appeal before us was brought in pursuance of the leave so granted. Defendants (appellants) contended that the Appellate Court had no power whatever in any case to act under the rule referred to, that even if it could so act there were no proper grounds to justify its action, that it is open to them in the present suit to impugn the order in both the grounds above stated, that it should be treated as a nullity and that the present suit should be dismissed as barred by the previous suit on the same cause of action.

It will be convenient to consider first how far it is open to the appellants to impugn the order in this suit. It seems to me if the order had been passed with jurisdiction it is not open to us now to consider the propriety of it on the merits. Where a Court which has power to act under Rule 1, Order XXXIII has exercised its discretion and passed an order under it, the fact that it was passed for insufficient reason does not, it seems to me, make the order one passed without jurisdiction. There is no question of defect of jurisdiction though the order may amount to an irregularity. This was the view taken in *Tirupati* v. *Muthu*.[2] It was held that the propriety of the order could not be questioned in the 2nd suit in *Perumal* v. *Karupan* [3] and also in *Chhajju* v. *Khyali Ram* [4]. The only authority to the contrary

1. (1886) I. L. R. 8 A. 82.
2. (1885) I. L. R. 11 M. 322.
3. (1910) 21 M. L. J. 574.
4. (1912) 14 I. C. 175.

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cited before us is the case in *Kali* v. *Panchanan* [1]. With all respect to the learned Judges in that case, I am unable to agree with the view that the jurisdiction of the Court to pass an order under the rule in question depends on the existence of proper grounds for the order allowing the withdrawal with liberty. Under the rule as enacted when the Court passing the order *is satisfied* that there are sufficient grounds it has the power to pass the order granting permission for a fresh suit; so that the erroneousness or insufficiency of the grounds on which the Court is so satisfied is not a matter affecting the jurisdiction of the Court. The weight of authority is against the view taken in the Calcutta case and I respectfully dissent from it, and follow the ruling of this Court with which I respectfully agree.

If, however, it is open to us to consider the propriety of the order of the District Judge now, the case in 8 All. 82 already cited is an authority for holding that there was proper ground in this case for the order made, as the plaintiffs' first suit was going to fail for the formal defect that his plaint did not properly set out his title.

If the appellants' contention that an Appellate Court has no power to act under Rule 1, Order XXIII, its application being confined to the Court of 1st instance is correct, then the order in question here will be one passed without jurisdiction and must be treated as *non est*. The case cited in *Watson* v. *The Collector of Rajshahye* [2] is, I think, a sufficient authority for holding that an order passed without jurisdiction can be treated as a nullity in a subsequent suit. The question then is whether the Appellate Court had no power to act under Rule 1, Order XXIII. The case in *Perumal* v. *Karupan* [3] supports the appellants' argument that no such power exists. With great respect to the learned Judges who decided that case I agree that the ruling should be reconsidered. It was doubted in *Veera Reddy* v. *Akka Reddy* [4] and dissented from in *Afzal Begam* v. *Akbari Khamam* [5]. The ruling in *Eknath* v. *Ranoji* [6] which expressly held that the Appellate Court had such power under S. 373, C. P. C. corresponding to the rule in question does not seem to have been brought to the notice

1. (1916) 23 C. L. J. 489.
2. (1869) 13 M. I. A. 160.
3. (1910) 21 M. L. J. 574
4. (1915) 28 I. C. 487.
5. (1916) I. L. R. 37 A. 116.
6. (1911) I. L. R. 35 Bom. 261.

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of the Judges. No previous decisions are cited in support of their view except the case in *Ganga Ram* v. *Data Ram* [1] which I shall consider later. Admittedly it is against the existing practice.

That decision holds on a consideration of the language of the rule that it cannot be extended to a suit in which a decree has already been passed; by this the learned Judges seem to mean that the exercise of the power is confined to a stage before the passing of any decree at all in the suit. I am unable to follow the argument that the language of the rule leads to such an inference. It may at the most point to a stage before a final and subsisting decree is passed in the case and not merely a first decree. The costs referred to in Clause (3) are what the Court awards when passing the order. They cannot be said to have been provided for already unless there is a subsisting decree. The withdrawal of a part of the claim stands on the same footing as the withdrawal of the whole; of course neither can be withdrawn if there is a subsisting decree. Where there is no subsisting decree I can see no difficulty at all in either case. Even apart from the language of the rule itself it is clear as explained by Tyrell, J. in *Ganga Ram* v. *Data Ram* [1] a suit cannot be withdrawn after it has terminated in a final decree; for so long as that decree is subsisting and operative the withdrawal will be against the terms of that decree. I do not think the language of the rule means anything more.

A decree once passed by a Court can be set aside by that Court itself either on review or under Order IX, Rule 13 if it was an *ex parte* decree; or its decree may be set aside by an Appellate Court and the case remanded for rehearing. In all these cases in spite of the fact that a decree was once passed the suit again becomes pending in the trial Court and it cannot be contended that that Court could not act under the rule at that stage. It will thus be seen that the fact that a decree has once been passed is of no importance provided that it is not a subsisting decree when the permission for withdrawal is given.

Under S. 107 Cl. (2) of the Code of Civil Procedure, the appellate court has the same powers as are conferred by the code on the court of original jurisdiction in respect of suits. As the first Court can act under Rule 1, Order XXIII when there is no subsisting decree, the Appellate Court can also do the same provided it sets aside the decree of the first court as it has

1. (1885) I. L. R. 8 All. 82.

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power to do. The Appellate Court's power is derived from the section and not by a process of substituting the word "appeal" for the word "suit" wherever it occurs in R. 1, Order XXIII as is suggested in the ruling under consideration.

With due respect it seems to me that the ruling in *Eknath* v. *Ranoji* [1] has been misunderstood in *Choragudi Chinna Kottayya* v. *Rajavaradaraja Appa Row* [2]. In that case the District Judge gave leave under R. 1, Order XXIII to the plaintiff before the admission of his appeal and without notice to defendant. There was a subsisting decree of the First Court which the District Judge did not and was not in a position to set aside as the appeal had not even reached the stage of admission. The High Court was right in holding that the District Judge had no power to allow the suit to be withdrawn with liberty as there was a decree in defendants' favour. The language used in the High Court's Judgment must be read with reference to the facts of the case.

I am therefore constrained to think that the ruling in *Choragudi Chinna Kottayya* v. *Rajavaradaraja Appa Row* [2] is not correct and that the Appellate Court has powers for proper reason to allow a suit to be withdrawn with liberty to bring a fresh suit.

I therefore agree to the reference as already stated.

V. K. Srinivasa Iyengar for *C. S. Venkatachariar* for Appellants.

K. V. L. Narasimham for Respondent.

The Court expressed the following

Opinion :— We agree with the learned Judges who made the reference that it is open to an Appellate Court in proper cases when reversing the decree of the lower Court to give the plaintiff leave to withdraw the suit with liberty to file a fresh suit.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir John Wallis, Chief Justice and Mr. Justice Coutts Trotter.

Vodiana Kamayya and another ... *Appellants* * (*Defendants*)

v.

Gudisa Mamayya ... *Respondent* (*Plaintiff*).

Kamayya v. Mamayya.

Fraudulent benami transfer—Fraud carried out—Transferee's suit for possession under the transfer—Plea of benami character of transaction—Sustainability.

A person who has conveyed property benami to another for the purpose of effecting a fraud on his creditors cannot, where the fraud has been effected, set up the benami character of the transaction by way of defence in a suit by the transferee for possession under the conveyance.

Doe d Roberts v. *Roberts* [3] followed.

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* S. A. No 472 of 1915. 28th April, 1916.

1. (1911) I. L. R 35 B. 261 2. (1914) 27 M. L. J. 244.

3. (1819) 2 B and Ald 368.

Kamayya v. Mamayya.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Ganjam at Berhampore in Appeal Suit No. 479 of 1913 preferred against the decree of the court of the Principal District Munsif of Berhampore in Original Suit No. 457 of 1912.

V. Ramesam for Appellants.

B. Narasimha Row and *T. Rangachariar* for Respondents.

The Court delivered the following

The Chief Justice.

Judgment:—*The Chief Justice.*—In this case, where the defendant had conveyed his property benami to the plaintiff for the purpose of effecting a fraud on his creditors and the fraud had been effected, the Subordinate Judge has decided that he cannot set up the benami character of the transaction by way of defence in a suit by the plaintiff for possession under the conveyance. This was expressly ruled by Jenkins, C. J. and Beaman, J. in *Sidlingappa* v. *Hirasa* [1] following *Doe de Roberts* v. *Roberts* [2]. I do not think the learned Judges who decided *Prole* v *Wiggins* [3] intended to question this decision. It appears to be in accordance with the principles laid down by Lord Eldon in the earlier case of *Brackenbury* v. *Brackenbury* [4]. Both cases were referred to by Lord Hatherly in *Green* v. *Bateman* [5] but it was thought unnecessary to consider the principle they laid down or the manner in which it had been applied in other cases. As regards this court I do not find anything opposed to them in *Rangammal* v. *Venkatachari* [6] or *Yaramati Krishnayya* v. *Chundru Papayya* [7]. No doubt in these cases the suit was brought by the fraudulent transferors to set aside the conveyances and recover the properties, whereas here the defence is set up in a suit for possession by the fraudulent transferee but that was the state of things in the decisions already cited from which I am not prepared to differ. In the recent decision of the Privy Council in *Pether Perumal Chetty* v. *Muniandy Servai* [8] where the point did not arise expressly their Lordships cited with approval Mayne's observation in paragraph 446 of his Hindu Law that "if A requires the help of the Court to get the estate back into his own possession or to get the title into his own name, it may be very material to consider whether A has actually cheated X or not," and at page 559 they observed that to enable a fraudulent confederate to retain property trans-

1. (1907) I. L. R 31 B. 405.
2. (1819) 2 B. and Ald. 367.
3. (1836) 3 Bing. N. C. 230.
4. (1820) 2 Jac and W. 391.
5. (1872) L R. 5 H. L 597.
6. (1895) I L. R. 18, M. 378.
7. (1897) I. L.R. 20 M. 236.
8. (1908) I. L. R. 35 Cal. 551=18 M. L. J. 277.

Kamayya v. Mamayya.

The Chief Justice.

ferred to him in order to effect a fraud, the contemplated fraud must according to the authorities be effected. Then and then alone does the fraudulent grantor or giver lose the right to claim the aid of law to recover the property he has parted with." I can find nothing in these observations inconsistent with the authorities relied on for the plaintiff.

The appeal is dismissed with costs.

Coutts Trotter, J.

Coutts Trotter, J.—I entirely agree and only desire to add a few words, because the question has not expressly arisen in the courts of this Presidency. Both the parties to this litigation on the finding are guilty of fraud, and there are sound principles of law which would by themselves preclude the success of either. The difficulty is that one or the other must succeed and accordingly one has to see upon whom the incidence of the considerations barring success falls first. I may say at once that I am not impressed with the argument that to leave the property in the hands of the defendant would be to ratify that very fraud which has defeated the rights of the plaintiff's creditors by continuing to keep the property out of their reach. The answer to that is that the creditors or any one of them in a properly constituted action can as against either or both of these parties, establish their rights and set aside the transaction. The only other observation that I desire to make is, that I do not think that there is any conflict between *Doe de Roberts* v. *Roberts* [1] and *Prole* v. *Wiggins* [2]. The distinction between the two cases is indicated by Tindal, C.J., in the latter, and the principle I gather from it is this; if the plaintiff can set up a case consistent with the terms on the face of the document or with what I may call the face import of the transaction on which he bases his claim then the defendant cannot defeat that claim by alleging a fraud that implicates himself and showing that because of that fraud the document or the transaction is not what it appears to be. That is *Doe de Roberts* v. *Roberts* [1]. If on the other hand the plaintiff cannot make a case on the document or transaction on its face but has to go behind it and allege some other transaction which involves implicating himself in a fraud with the defendant then the defendant must succeed. That is the case of *Prole* v. *Wiggins* [2]. In other words that party fails who first has to allege the fraud in which he participated.

A. S. V.

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1. (1819) 2 B and Ald. 368. 2. (1836) 3 Bing. N. C. 230.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir John Wallis, Chief Justice and Mr. Justice Seshagiri Aiyar.

T. A. Chidambaram Chetty and another ... *Appellants* * (*Defendants*)

v.

M. L. M. Ramanatham Chetty ... *Respondent* (*Plaintiff.*

Chidambaram Chetty *v.* Ramanatham Chetty.

Civil Procedure Code, Ss. 38, 44—Decree passed by a British Indian Court—Transmission to a court of a native state for execution--Legality of—Settled practice on a question of procedure whether should be followed, when want of jurisdiction established—Ex parte order without jurisdiction—The right of party to question.

A British Indian Court which passes a decree cannot transmit it for execution to a court in a native state. It is a well known principle of jurisprudence, that no country can legislate for the procedure to be followed in another state. An order transmitting a decree to a native state for execution is not sanctioned by the Code of Civil Procedure. *Kasturchand* v. *Parshu Mahar* [1], followed.

A long course of practice on a question of procedure can be departed from, where want of jurisdiction is established.

Where an order is passed and it is without jurisdiction, the party aggrieved is entitled when it comes to his notice to apply to vacate it, even though he has not appealed against the same.

On appeal from the order of the Honourable Mr. Justice Coutts Trotter dated the 6th November 1916 passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court in C. S. No. 111 of 1915.

The Hon. The Advocate General, for the Appellant.

A. Krishnaswami Aiyar, for the Respondent.

The Court delivered the following

Judgment :—In *Original Suit No. 111 of 1915,* the respondent obtained a decree on the original side of the High Court against the appellant for a large sum of money. In November 1915, an application was made for concurrent execution of this decree in Madras, Burma, Tanjore and Pudukottah. As the decree was passed within a year of the application, it was granted without notice to the appellant. The decree was transmitted to the Chief Court at Pudukottah on the 23rd November 1915 for execution. On the 19th October 1916, an application was made to Coutts Trotter, J. for the cancellation of the order transferring the decree

* O. S. A. No 67 of 1916. 25th January, 1917.

1. (1887) I. L. R. 12 Bom. 230.

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to Pudukottah. The application was dismissed, on the ground apparently that it was in accordance with settled practice. Hence this appeal.

S. 39 of the Code of Civil Procedure provides for the transmission of decrees for execution to Courts within whose jurisdiction either the judgment debtor resides or his property is situate. S. 40 deals with the transmission of decrees to another province in British India. S. 43 provides for a decree being sent to a court established by the Governor General in Council outside British India under the Foreign Jurisdiction Act. As supplementary to S. 43, S. 45 lays down that in the courts so established the rules which are observed in the execution of decrees in Courts in British India shall be followed. S. 44 deals with decrees of what are known as favoured Native states. That section provides that decrees of the Courts of any Native Province or state in alliance with His Majesty may be executed in British India as if they were passed in British India. There is no converse provision that decrees passed in British India can similarly be executed in Courts established by the authority of a Native Province or state. The absence of such a provision seems to be conclusive upon the question. Further it is a well known principle of jurisprudence that no country can legislate for the procedure to be followed in a foreign state. Therefore it seems to us that the order transmitting the decree for execution is not sanctioned by the Code. There is the positive authority of *Kasturchand Gujar* v. *Parsha Mahar* [1] in favour of this view. The case of *Rantan Mahanti* v. *Khatoo Sahoo* [2] also enunciates the same principle. As regards the suggestion that a long practice should not be departed from on a question of procedure it is enough to say that where want of jurisdiction is established, long practice would not avail. *Palmer* v. *Hutchinson* [3] and *Rajah of Ramnad* v. *Seetharam Chetty* [4].

Mr. Krishnaswami Aiyar for the respondent drew our attention to the fact that no appeal was preferred against the order transmitting the decree for execution, and argued that it is not open to us to question its validity at this stage. We are of opinion that as the order was passed exparte and was without jurisdiction the appellant is entitled when it comes to his notice to apply to

1. (1887) I. L. R. 12 B. 230.
2. (1902) I. L. R. 29 C. 400.
3. (1881) L. R. 6 A. C. 619
4. (1902) I. L. R. 26 M. 120.

vacate it within the time limited under Art. 182 of the Limitation Act. As it relates to the execution of the decree which was sent to Pudukottah in November 1915, there is no bar of limitation. See *Tikat Ajant Singh* v. *F. T. Christen* [1].

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We must therefore hold that the order transmitting the decree was made without jurisdiction and must be set aside. We make no order as to costs.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Oldfield and Mr. Justice Phillips.

Puthisseri Maniyannoor Puthamvittil Narayana Nair ... *Appellant* * *Plaintiff*

v.

Thozukkat Pullaniyil Narayanna Nambier and another ... *Respondents* (*Defendants*

Puthisseri Maniyannoor v. Thozukkat Pullaniyil.

Malabar Law—Tarwad joint property—Sale by some of members of tarwad—Binding nature on other members and on tarwad as a whole—Conditions—Karnavan's joining in sale—Necessity—Co-owners—Mortgage—Redemption suit by one—Decree for partition and redemption of plaintiff's share when will be passed—Second Appeal—Amendment of Plaint in—Practice.

A sale of the joint property of the members of a Malabar tarwad by some only of the members of the tarwad cannot bind the other members or the tarwad as a whole unless it is made for consideration and is beneficial to the family as a whole and unless the karnavan as representing the tarwad joins in it.

Arayalprath Kunhi Poeker v. *Kanthilath Ahmad Kutti Haji* [2], followed.

The fact that the karnavan was absent from the place at the time of the sale and that the sale was effected by the senior lady and the real manager will not make it binding on the tarwad.

In a suit by one co-owner for redemption of the whole mortgage the Court can, if there is no great difficulty in ascertaining the particular share to which plaintiff is entitled, pass a decree for both the reliefs for partition and redemption. The principle of the decisions in *Mamu* v. *Kuttu* [3] and *Thillai Chetti* v. *Ramanatha Aiyan* [4], must be restricted to cases where plaintiff's share cannot be so ascertained.

In second appeal their Lordships allowed plaintiff to amend his plaint, which prayed for redemption of the whole mortgage, by praying for recovery in the alternative of the share and for partition and redemption of such share on payment of the proportionate amount of the mortgage-money.

Second Appeal against the Decree of the Court of Subordinate Judge of South Malabar at Calicut in Appeal Suit No. 385 of 1912 preferred against the Decree of the Court of the District Munsif of Ponnani in Original Suit No. 584 of 1910.

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* S. A. No. 724 of 1913 — 29th November 1916.

1. (1912) 17 C. W. N. 862.
2. (1905) I. L. R. 29 M. 62.
3. (1881) I. L. R 6 M. 61.
4. (1896) I. L. R. 20 M 295.

Puthisseri Maniyannoor v. Thozukkat Pullaniyil.

The case came on for hearing in the first instance before their Lordships (Oldfield and Sadasiva Aiyar, JJ.)

K. P. M. Menon for Appellant.

T. R. Ramachandra Aiyar and *T. R. Krishnaswami Aiyar* for Respondents.

The Court delivered the following

Sadasiva Aiyar, J.

Judgments:—*Sadasiva Aiyar, J*;—The plaintiff is the appellant. The suit was brought for redemption of a registered usufructuary mortgage for Rs. 250 dated 13th June 1905 executed by the representative of the five thavazhies which had branched out from a single tarwad called Pudusheri Maniyannoor tarwad. The defendants three to eight are members (along with the plaintiff) of one of these five thavazhies. The plaintiff has not made the members of the other four thavazhies parties to this suit though it is conceded that the mortgage of 1905 was executed on behalf of all the five thavazhies. Now the plaintiff is the karnavan of his own thavazhi only which consists of eight members there being about 31 members in the other four thavazhies. As far as I could gather from the plaint, the plaintiff ignores the other four thavazhies and sues for redemption as the karnavan of his own thavazhi alone.

One question raised in the suit was whether the plaintiff's thavazhi and the four connected thavazhies had become divided in interest long before the date of this suit and had thus become separate tarwads. (A thavazhi or branch of a tarwad after the branch got divided from its sister thavazhies could be called a tarwad though when mentioned in relation to its sister thavazhies and its parent tarwad, it could be continued to be spoken of as a thavazhi, which would literally mean the line of a particular mother.)

The question of division has been answered in the affirmative by the Lower Courts and we ought to accept that finding of fact in Second Appeal. Now, if all the five connected thavazhies represented together the owner of the equity of redemption in the plaint lands, the plaintiff's tarwad is entitled to redeem the whole as one of five mortgagors who were tenants in common of the equity of redemption.

The plaintiff knew very well before the suit that the other four tarwads who were common owners with the plaintiff's tarwad of the plaint lands had sold their shares in the common equity of redemption to the second defendant by the two deeds Exhibits

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XVI and X, dated 1906 and 1907 and that seven out of the then ten members of the plaintiff's own tarwad had also sold their shares in the equity of redemption to the second defendant's vendor. (The second defendant has also purchased the right of the mortgagee, the first defendant.) The plaintiff artfully omitted all mention in his plaint of the other four tarwads and of the sale deeds in favour of the second defendant's vendor.

The second defendant in his written statement (paragraph 9) contended that the plaintiff was, in any event, entitled to redeem only the plaintiff's 1/40th share in the properties and was not entitled to redeem the whole. He further contended in paragraph 7 of his written statement that though three members out of the then ten existing members of the plaintiff's tarwad were not parties to either Exhibit XVI or X, the plaintiff's tarwad including those three members (of whom the plaintiff is one) are bound by the said sales.

The Lower Appellate Court held (*a*) that the members of the plaintiff's tarwad were entitled in accordance with the rule of division *per capita* each to 1/40 share in the equity of redemption on the dates of Exhibits XVI and X. The ten members then existing would be entitled on this basis to 10/40th share in the equity of redemption; (*b*) Exhibits XVI and X taken together were binding on the plaintiff's tarwad including the plaintiff and others who were not parties to either of those two documents. The plaintiff's suit was therefore wholly dismissed.

The defendant's own documents Exhibits XVI and X admit that the then (ten) members of the plaintiff's tavazhi were each entitled to 1/40 share in the equity of redemption, seven of them having (according to the recitals) received each his 1/40th share in the purchase money and the remaining 3/40th shares being left with the purchaser. The finding of the Lower Appellate Court that the members of the plaintiff's tarwad were entitled to 10/40th share is thus supported by the defendants' own documents.

Mr. K. P. M. Menon for the plaintiff consented to accept the position which was suggested by the respondent's vakil Mr. T. R. Ramachandrier (though not adhered to by him till the end) that the plaintiff's tarwad as one of five sister tarwads was entitled to 1/5th share in the equity of redemption. I think we are entitled to proceed on the footing that the plaintiff's tarwad is enti-

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tled at least to redeem 1/5th share of the mortgaged properties if Ex. XVI and X are not binding on the plaintiff's tarwad. Now it seems to me to be clear law that the 1/5th share of the plaintiff's tarwad in the equity of redemption being the joint property of the members of the plaintiff's tarwad, the sale of the whole of that property by only seven out of ten members cannot bind the other members or the plaintiff's tarwad as a whole unless it was made for consideration and *was beneficial to the family as a whole* and unless the karnavan as representing the tarwad joined in it. (*See Arayalprath Kunhi Pocker* v. *Kanthilath Ahmad Kutti Haji*[1]). The Lower Appellate Court has not found that the sale of the share of the plaintiff's tarwad was beneficial to the tarwad. Further the plaintiff was and is the karnavan of his tarwad and I cannot accept the Lower Court's view that because the fourth defendant was the senior lady and the real manager and because the plaintiff was absent from the place, the sale by her of the joint property of the plaintiff's tarwad is binding on the tarwad. I am therefore of opinion that the title to the plaintiff's tarwad's 1/5th share in the equity of redemption was subsisting in the plaintiff's tarwad on the date of this suit and that it can be redeemed by the plaintiff.

Mr. Ramachandra Aiyar finally contended that as the plaintiff's suit is for the redemption of the whole, as he could not get possession of the 1/5th share without suing for partition and as he did not pray in the plaint in the alternative for partition and possession, the dismissal wholly of the plaintiff's suit by the Lower Courts could be supported. He then referred to an incidental observation of mine in the judgment in *Rathna Mudali* v. *Perumal Reddy* [2]. In that case, the owner of a half share of the equity of redemption insisted on redeeming the whole against the will of the mortgagee who had purchased the other half in the equity of redemption. Sundara Aiyar, J. and myself held that he could not so claim to redeem the whole against the will of the mortgagee. The plaintiff-appellant, however, consented before us in that case to a decree being passed for redemption of a half share on payment of half the mortgage money and to have a decree for partition and possession of that half. *The mortgagee—4th defendant also consented to that course.* Mr. Justice Sundara Aiyar thought that whether the mortgagee consented

1. (1905) I. L. R, 29 Mad. 62. 2. (1912) 23 M. L J. 576 at p. 585.

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or not, the plaintiff though he sued for redemption of the whole could be given a decree for redemption, partition and possession of one-half. I held that, as the 4th defendant consented to that course, such a decree could be passed and I threw out the observation (relying on *Thillai Chetty* v. *Ramanatha Ayyan*, [1]) that, because in the Lower Courts, the 4th defendant had not given his consent, the decree of the Lower Appellate Court dismissing the suit was correct as it stood. In *Thillai Chetti* v. *Ramanatha Ayyan*, [1] it was held that until a partition of the mortgaged property among the several co-owners of the equity of redemption by metes and bounds had been first effected one co-owner cannot sue to redeem the whole mortgage. In that case, it appears that the ascertainment of shares was a difficult operation and the result of the decree in the plaintiffs' favour for redemption of the whole would have been to compel the first defendant and other co-owners and co-mortgagors to bring a suit or suits *for ascertainment of their shares* and for the recovery of the same from the plaintiffs on payment of their contributions towards the mortgage money. The decision goes on to say "This is the very evil which was pointed out and guarded against by the learned Judges who decided the case of *Mamu* v. *Kuttu* [2]." In this earlier case *Mamu* v. *Kuttu* [2] the respondent was not represented and the argument of Mr. Sankaran Nair (afterwards a Judge of this Court) for the appellant that as the plaintiff's definite share was not ascertained by a proper prior suit for partition, he cannot be allowed to redeem the whole of the mortgaged property prevailed. Mr. Justice Sundara Aiyar in *Rathna Mudali* v. *Perumal Reddi* [3] was not prepared to follow the two decisions in *Mamu* v. *Kuttu* [2] and *Thillai Chetti* v. *Ramanatha Ayyan* [1] (see page 580). On further consideration, I am inclined to hold that if *Mamu* v. *Kuttu* [2] and *Thillai Chetti* v. *Ramanathan Ayyan* [1] are sound law on the question of the necessity for a prior suit for partition, the principle of those decisions must be restricted to cases where the circumstances are similar to those dealt with by those decisions, in other words restricted to cases where there is great difficulty in ascertaining the particular share to which the plaintiff was entitled. In the present case, the plaintiff's learned Counsel having agreed to its

1. (1896) I. L. R. 20 Mad. 295. 2. (1882) I. L. R. 6 Mad. 61.
3. (1912) 23 M. L. J. 567.

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being taken that the plaintiff's tarwad is entitled only to 1/5th share and the lower Courts having found on the evidence that the members of the plaintiff's tarwad were each entitled to 1/40th share in the equity of redemption on the dates of Exhibits XVI and X, there seems to be no such difficulty in passing a decree for both the reliefs for partition and redemption in the same suit. In the result, I would direct the plaintiff to amend the plaint by praying for recovery in the alternative of 1/5th share and for partition and possession of such 1/5th share on payment of 1/5th of the mortgage amount within 3 weeks. As the Lower Courts have not considered the 6th issue in the case I would, on such amendment, remand the case to the Lower Appellate Court for a finding on the 6th issue on the evidence on record. Six weeks are allowed for submitting the finding and seven days for filing objections. If the plaint is not so amended, the Second Appeal will stand dismissed with costs.

Oldfield, J.

Oldfield, J.:—I agree and have nothing to add.

[In compliance with the order contained in the Judgment, the Subordinate Judge of South Malabar at Calicut submitted that plaintiff would be entitled to claim credit as an item of account for 1/5th of the suit properties and that the mortgagee in possession committed waste by cutting and wasting the suit trees.]

The Court (*Oldfield and Phillips, JJ.*) delivered the following

Judgment:—We accept the Lower Appellate Court's finding and, setting aside the decrees of the Lower Courts, grant plaintiff a preliminary decree for redemption and possession of one-fifth of the suit property in the usual form. Time, six months. The case is remanded to the Court of the District Munsif in order that a final decree may eventually be passed. No order as to costs in this Court.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir John Wallis, Chief Justice, Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

Chikkam Ammiraju v. Chikkam Seshamma.

Chikkam Ammiraju and others ... *Appellants* Defendants*).

v.

Chikkam Seshamma and another ... *Respondents (Plaintiffs)*

Contract Act, S. 15—Coercion—Contract entered into by a Hindu wife under the threat by her husband that he would commit suicide—Whether voidable.

* L. P. A. No. 121 of 1916. 23rd January 1917.

Chikkam Ammiraju
v.
Chikkam Seshamma.

Where a Hindu threatened that he would commit suicide if his wife and son would not execute a deed in his favour and they in consequence executed the document.

Held, (per *The Chief Justice* and *Seshagiri Aiyar, J., Oldfield, J., dissenting*) the deed was entered into under "coercion" within the meaning of S. 15 of the Contract Act, suicide being an act forbidden by the Indian Penal Code.

Per Oldfield, J. S. 15 of the Indian Contract Act should be construed strictly. A threat to commit suicide is not an attempt to commit suicide in the legal sense of the term. A prohibition to commit suicide inferred from the fact that attempts to commit suicide are prohibited by the Indian Penal Code, cannot be taken into consideration in construing S. 15 of the Contract Act, as the section has to be construed strictly.

Appeal under Clause 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Sadasiva Aiyar in S. A. No. 1357 * of 1914 preferred against the decree of the District Court of Godávari at Rajahmundry in A. S. No. 6 of 1913 (O. S. No. 4 of 1912 on the file of the Court of the Temporary Subordinate Judge of Rajahmundry.)

In S. A. 1357 of 1915 the Court (Sadasiva Aiyar and Moore, JJ.) delivered the following

Judgments :—*Sadasiva Aiyar, J.*—The defendants are the appellants. The only question in this case is whether the release-deed Ex. A. was executed by the plaintiffs with their free consent or whether it was obtained from the two plaintiffs (mother and son) through the exercise of coercion or undue influence or both, brought to bear upon them by the defendants (the younger brothers of the 1st plaintiff's husband) and their father Doraiyya through the 1st plaintiff's husband Swami who threatened to commit suicide unless the plaintiffs executed the release deed (Ex-A) in respect of their reversionary rights in certain lands which the 1st plaintiff's mother had sold without necessity to the defendant's father's vendor.

The lower Courts found (a) that the 1st plaintiff's husband (the 2nd plaintiff's father) did threaten to commit suicide if the plaintiffs would not execute the release deed and that it was on account of that threat working on their minds that the plaintiffs executed the deed; (b) that such a threat was "coercion" and a deed brought about by such a threat is not a deed executed with free consent and (c) that though the threat was not made by the defendants (the parties to the deed) but by their brother, the document was voidable as "coercion" used by a person who is not a party to the deed also negatived free consent. On these findings the plaintiff's suit for cancellation of the deed was decreed.

The material contentions in second appeal are found in the grounds 3 and 4 of the memorandum as follows :—

"3. The facts relied upon by the Courts below do not in law constitute coercion or undue influence."

"4. The Courts below ought to have held that any persuasion on the part of the 1st plaintiff's husband who is no party to Ex. A, even if proved, cannot invalidate the document." Coercion is defined (Contract Act, Section 15) as "committing, or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain any property, to

* 24th March 1916.

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the prejudice of *any person whatever*, with the intention of causing *any person* to enter into an agreement". I think the words "any person whatever" have been advisedly used by the Legislature to indicate that the act need not be to the prejudice of the person entering into the Contract. I think also that the words "to the prejudice of any person whatever," which are separated by a comma from the previous word "property" relate both to the committing or threatening to commit an act forbidden by the Penal Code and to the unlawful detaining or threatening to detain property. It means the same thing whether, when a man kills himself, it is called an act of suicide or a successfully accomplished attempt to commit suicide; and an attempt to commit suicide is punishable under the Penal Code. Hence suicide and an attempt to commit suicide are acts *forbidden* by the Penal Code though the former cannot be punished under the code as a dead man cannot be punished. Provided the threat of the forbidden act does have the intended effect of bringing about the consent to the agreement, it does not matter who made the threat or to whose prejudice it was made. Mr. Patanjali Sastriar for the appellants argued that the "prejudice" to the feelings or to the supposed spiritual welfare of the wife and son of Swami by the carrying out of Swami's threat was not the sort of prejudice contemplated by S. 15 and that the "prejudice" to Swami's own life by the threatened act was immaterial as he was not a party to the deed. It is unnecessary to go into the question whether prejudice or injury to sentiments, feelings or supposed spiritual welfare is also contemplated in the definition of coercion in the Contract Act. (See, however. Ss. 298, 499, 508 etc., of the Indian Penal Code showing that the Criminal law does recognize also acts causing some of such sentimental injuries as punishable). I agree with the lower Courts that the prejudice to Swami's own life is sufficient to bring his threat within the definition of "coercion," provided it was intended by the person using the threat to bring about the agreement thereby. Mr. Sastriar put the following question in support of his contention: "Suppose A threatens to blow up the Taj Mahal unless B gives C a pronote for Rs. 10,000 and suppose B is a man of such fine artistic feelings that to save the noble structure, he gives the pronote, is the note voidable for coercion?" I see no difficulty in answering the question in the affirmative, provided the court is able to arrive at the conclusion that the threat (which was to do an act of mischief or vandalism prohibited by the Penal Code to the prejudice of Government) was intended to bring about the execution of the pronote and did have that effect (I need not say that the mere use of the threat will not render the agreement voidable unless the agreement was not only intended to be but *was actually* "*caused*" by it. See S 19 of the Contract Act and the explanation thereto.) That the threat need not proceed from the party to the agreement has been held in *Askari Mirza* v. *Jai Kishori*[1] relying on the well known books of Shephard and Pollock on the Contract Act. It is unnecessary to consider in detail the question whether the release deed was caused by undue influence. The line between coercion (section 15 of the Contract Act) and undue influence (section 16 of the Act) is sometimes thin and it is possible to conceive of cases where the Act might fall under both heads. In *Ranganayakamma* v. *Alwar Setti*[2] a widow executed a deed of adoption, as her relations (*not the adopted boy*) obstructed the removal of her husband's corpse by her or her guardian to the cremation ground unless she executed the deed. Collins, C J. and Muthuswami Aiyar, J., held that the act of the defendants was an unlawful act covered by section 15 or section 16 of the Contract Act (see at page 224). I think that when a man uses a threat of suicide to his wife and his son and they owing to the distress of mind caused by the

1. (1912) 16. I. C. 344. 2. (1889) I.L.R. 13. Mad. 214.

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strength of that threat execute a document, they are persons "whose mental capacity" which, I take it, includes volitional freedom and strength) "is temporarily affected by reason of mental distress" within the meaning of that expression in clause 2 (b) of section 16 of the Contract Act.

I would therefore dismiss the second appeal with costs.

Moore, J.—I regret that I have the misfortune to differ from my learned brother.

The findings of the Lower Courts which we must accept are that, under a threat of suicide by Swami, his wife the 1st plaintiff, and his son the 2nd plaintiff executed the release deed. There is evidence that the 1st plaintiff was greatly distressed owing to her son having run away from home in order to avoid having to execute this document, and that owing to the pressure brought to bear upon her by her husband, coupled with his threat to commit suicide, she was induced to join in the execution of the document. I have found considerable difficulty in deciding the question whether the husband's threat to commit suicide amounts to coercion as defined in section 15 of the Contract Act. The difficulty lies in the words "to the prejudice of any person' which occurs in the section and which must I think be read with both branches of the section. The lower courts have not dealt with the question in a satisfactory manner. The Subordinate Judge says, "The degrading position to which a respectable Hindu wife would be reduced in case Swami had given effect to his threat should have considerably contributed in (*sic*) inducing the plaintiff to sign Exhibit A." The District Judge observes that "there is no doubt that a threat to commit suicide constitutes coercion within the meaning of S. 15 of the " Contract Act. The words of the section are very wide and the coercion invalidating the contract need not proceed from a party to that contract or be immediately directed against the party whom it is intended to coerce to enter into the contract or affect his property, or be specifically to his prejudice.

The words (act forbidden by the Penal Code) make it clear that the court must decide whether the alleged act of coercion is such as to amount to an offence.

Suicide is I take it (an act forbidden by the Penal Code) as the abetment of suicide is punishable (S. 30⅟, Indian Penal code).

I am unable to accept as correct the view taken by the lower court that the prejudice to Swami's own life was sufficient to bring the threat within the definition of "coercion" (assuming that Swami intended by the threat to induce his wife and son to execute the release deed). In *Ranganayakamma* v. *Alwar Setti* [1] it was held that an adoption by a Hindu widow 13 years of age was not binding on her, it having been found that the relations of the adopted boy obstructed the removal of the corpse of her husband from her house until she consented to the adoption. The decision proceeded on the ground that the widow's consent to the adoption was not free. The court seems to have thought that the obstructing the removal of the corpse by the deceased's widow was within S. 15 of the Contract Act as being forbidden by the Penal Code, the section applicable being presumably S. 297, Indian Penal Code. In the 13 Madras case however there would have been no difficulty in finding that the widow's consent was obtained by "undue influence," within the meaning of S. 16 of the Contract Act. As regards the question whether the release deed was brought about by "undue influence," it may be that Swami was in a position to dominate his wife's will but he was not a party to the contract and S. 16 (2) (b) of the Contract Act consequently does not, I think, apply.

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1. (1889) I. L. R. 13 Mad. 214.

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The Subordinate Judge's finding (paragraph 12 of the Judgment) is that Exhibit A, was executed under coercion though not under undue influence in the strict legal sense (whatever that may mean). The conclusion I have arrived at though with considerable hesitation, is that the facts relied on by the lower courts do not in law constitute "coercion" or "undue influence," so as to invalidate the release deed executed by the plaintiffs, I would, therefore allow the appeal.

Court :—Under S. 98 of the Code of Civil Procedure, the decree of the Lower Appellate Court is confirmed with costs

Against this an appeal was preferred under cl. 15 of the Letters Patent.

M. Patanjali Sastri for *P. Narayana Murti* for the Appellants.

G. Venkatramiah for the Respondent.

The Court delivered the following

Sir John Wallis, C. J.

Judgments :—*The Chief Justice* :—It has been found by both Courts that the deed in question was obtained by coercion, the coercion consisting in a threat by the fifth witness for the plaintiffs to his wife and son that he would commit suicide if they did not execute the document.

It is easy to set up such a defence and the evidence in support of it should therefore be very closely scrutinized before it is held to be made out. Here it has been found as a fact and we are not at liberty to interfere with the finding on second appeal.

The case now comes before us on a Letters Patent Appeal owing to a difference of opinion between Sadasiva Aiyar and Moore, JJ. as to whether the facts as found amounted to coercion within the meaning of S. 15 of the Indian Contract Act.

The point mainly argued before us was that suicide was not an act forbidden by the Indian Penal Code within the meaning of the section. With this I cannot agree. At common law suicide was a form of homicide. "Homicide properly so called" says Hawkins, (Pleas of the Crown, Book I, Ch. 9) "is either against a man's own life or that of another." Wilful homicide was felony, and on finding that the suicide was *felo de se* his chattels were forfeited to the Crown like those of other convicted felons. In S. 299 of the Indian Penal Code the offence of culpable homicide is defined in terms which are sufficiently wide to cover deliberate suicide which is dealt with by Mr. Nelson in his Indian Penal Code as a species of unlawful homicide, though, of course, S. 302 and the following sections which prescribe the punishment for the various kinds of homicide are only applicable to living offenders. These sections are immediately followed by Ss. 305 and 306 which

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make abetment of suicide punishable with death in some circumstances and with lesser penalties in others. Then after dealing in Ss. 307 and 308 with attempts to commit murder and to commit culpable homicide the Code proceeds in S. 309 to provide for attempts to commit suicide. I find it impossible to hold that an act which it is made punishable to abet or attempt is not forbidden by the Indian Penal Code, especially as the absence of any section punishing the act itself is due to the fact that the suicide is in the nature of things beyond the jurisdiction of the Court, and it is no longer thought desirable to inflict a vicarious punishment on those who come after him by forfeiting his goods to the Crown.

As to the second point, the act threatened must be "to the prejudice of any person whatever", and would cover threats to a wife to murder her husband or to a son to murder his father. Here the threat was by the husband and father to kill himself, which must be taken to be an act to his own prejudice which seems to me sufficient to satisfy the section. I may add that I think the threatened act would also be directly to the prejudice of the wife, as it must be taken to be to the prejudice of any wife to deprive her of her husband, especially of a Hindu wife who thereby incurs all the disabilities of a Hindu widow. For the same reason I think the act must be taken to be to the prejudice of the son. I would therefore dismiss the appeal with costs.

Under S. 36 of the Letters Patent the appeal is dismissed with costs.

Oldfield, J.

Oldfield, J:—I have the misfortune to differ from the learned Chief Justice and therefore deal with the case at length.

The question is whether a threat to commit suicide is a threat to commit an act forbidden by the Indian Penal Code within the meaning of S. 15, Indian Contract Act; and it is conceded that it is not forbidden either directly or in the sense that a penalty is provided for it. It therefore can be regarded as forbidden only by implication. It is accordingly in place to consider whether S. 15 can be construed by implication or should be read strictly.

S. 15 has given rise to few decisions and to none in which the policy of the portion we are concerned with, has been defined. No definition of that policy has been suggested before us and advisedly. For it would be hard to argue that any general policy is in question, when the coercive character of an act

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depends on the applicability to it of a statute, which, though wide, does not enumerate acts criminal in India exhaustively, which, (as the illustration shows) need not have been enacted at all or need not have been in force at the date or place in question and which might make conduct punishable although it would be so under no law binding on those concerned or of which they could even be presumed to have known. The test thus provided may commend itself as definite but can be regarded only as arbitrary and not as intended to promote any general policy, by reference to which liberal construction can be supported. Taking this view, I am bound to scrutinize respondent's arguments closely.

The first is that a threat to commit suicide is indistinguishable from one to attempt to do so and that such an attempt is forbidden by S. 309, I. P. C. which penalises it. The answer is that threats of these two descriptions are distinguishable unless the word "attempt" is used throughout the argument in its ordinary sense as equivalent to "endeavour" and not, as it must be in the second place, where it occurs, in the legal sense in which it is used in Ss. 305 and 511. Further if the word is used in its legal sense throughout, a threat to attempt to commit suicide. is not only different from one to commit suicide, but is, like other threats to commit an attempt, a contradiction in terms. For an attempt in the legal sense can be recognised as such only after the criminal's intention has been frustrated, not when it is expressed; that is, when the threat is made.

The remaining contention relied on is that the Code impliedly forbids suicide, because in Ss. 306 and 309 it explicitly forbids abetment of it and attempt to commit it. But this will advance the argument, only if it corresponds with some general principle; and it does not as regards abetment. For, apart from the cases of abetment of children and lunatics, it is not suggested that acts done without guilty knowledge or intention (and therefore innocently), but which nevertheless can be abetted under Section 108 Explanation 3, are forbidden. The principle, if there is one, is therefore sustainable only subject to these exceptions. But even so 'reference to it is useless. For it is not shown that it can be tested by application to any instance, except the case of suicide, with which we are concerned; and there is no more security for

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its validity, when such test is impossible, than for the validity of respondents' argument as applied to that case alone.

Respondents must therefore succeed, if at all, on the single and direct contention that in case of suicide a prohibition can be inferred from the prohibition of attempts to commit it; and with all respect, having decided in favour of a strict construction of S. 15, Indian Contract Act, I cannot accept it. No doubt the only species of prohibition, employed in the Code, the specification of a penalty, would be useless in this case. But it does not follow that the failure to employ the other direct prohibition, or to make provision for the case of suicide in the Contract Act was due to inadvertence and that the omission should be supplied by inference. For it is possible that provision was omitted deliberately, because cases for its application would be rare and their truth difficult to establish, the party alleged to be coerced having usually easier means of preventing the accomplishment of the threat than by entering into the agreements sought to be avoided.

Holding that respondents cannot succeed on S. 15, I turn to S. 16 on which they also rely. In this connection the threat of suicide is irrelevant, since Swami, who made it, was not a party to the contract; and there is no finding of fact, which would support any exercise of undue influence by the parties to the contract appellants. This plea therefore fails.

As the majority of the Court would dismiss the appeal with reference to S. 15, respondents' other contentions have not been heard. On the view I take it would be necessary to consider them before the appeal could be disposed of.

Seshagiri Aiyar, J.

Seshagiri Aiyar, J.:—I agree with the judgment of the learned Chief Justice.

I do not think that the evidence in this case is sufficient to warrant a finding on the question of undue influence. On the question of coercion, although I had some doubts in the beginning, I have come to the conclusion that the facts do bring the case within S. 15 of the Indian Contract Act. Mr. Patanjali Sastri argued that threatening to commit suicide is not forbidden by the Indian Penal Code. A man who commits suicide goes unpunished, because the law cannot reach him, and not because the offence is not forbidden. The Code makes a person who abets the committing of suicide punishable. It also

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reaches a man who attempts to commit suicide. Although, therefore, there is no provision in the Indian Penal Code which forbids in terms commission of suicide, there can be no doubt that the intention of the legislature is to forbid such an act. I agree with Mr. Venkatramiah that the term "any act forbidden by the Indian Penal Code" is wider than the term "punishable by the Indian Penal Code." Simply because a man escapes punishment, it does not follow that the act is not forbidden by the Indian Penal Code. For example, a lunatic or a minor may not be punished. This does not show that their criminal acts are not forbidden by the Indian Penal Code. On the same analogy, a man who commits suicide escapes punishment because by committing the act, he is out of the reach of the law. Where the abetment of it and the attempt to do it are both made punishable by the Indian Penal Code, I am prepared to hold that the act itself is one forbidden by the Indian Penal Code.

The second contention of the learned Vakil was that the threat to commit suicide could not have prejudiced the plaintiff. I agree with him that mere sentimental prejudice is not what the law contemplates. As pointed out in *The Queen* v. *The Metropolitan Board of Works*[1] some legal injury must flow in order that the man may be said to have been prejudiced. See also *Clark* v. *London General Omnibus Compauy, Ltd.* [2] Accepting this test, I am unable to hold that the wife to whom the threat was addressed by a husband that he would commit suicide in case she does not execute a document is not prejudicially affected by such a threat. In my opinion, the possibility of the husband dying leaving the wife and the child uncared for is sufficient in the eye of the law to furnish the ground of prejudice. On this ground I agree with Mr. Justice Sadasiva Aiyar in thinking that Exhibit A was brought about by the use of coercion and that it should be set aside.

The appeal should be dismissed with costs.

C. A. S.

1. (1863) 3 Best and Smith 710.
2. (1906) 2 K. B 648.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Oldfield.

Gopalaiyar ... *Appellant* * *(Plaintiff)*

v.

Tiruvengadam Pillai, late a minor by his Guardian and maternal uncle Kendasami Pillai, but now declared a major by Order of this Court dated this 22nd December 1916 and another. *Respondent (Defendants No. 3 & 2)*

Gopalaiyar *v.* Tiruvengadam Pillai

Civil Procedure Code, O. 37—Summary Procedure—Suit on pro-note and decree therein—Order setting aside decree on condition of deposit of security for satisfaction of decree that may be passed against defendant—Money deposited as security—Charge on, for decree amount—Distinction in case of security of specific property such as land.

Where the decree in a suit on a promissory note under the summary procedure prescribed by O. 37 of the Code of Civil Procedure is ordered to be set aside on condition of the defendant depositing security for satisfying any judgment that may be passed against him, the decree amount must be regarded as being charged on money deposited as security in pursuance of the order and the Court cannot hold an enquiry as to whether the amount so deposited really belongs to the defendant or not.

Quaere: Whether a case in which specific property such as land is furnished as security will stand on a different footing.

In re Ford Exparte, The Trustee [1] and *Bird* v. *Barston* [2], followed.

Errikulappa Chetty v. *Official Assignee, Madras* [3], distinguished.

Second appeal against the decree of the District Court of Tanjore in Appeal Suit No. 931 of 1913, preferred against the decree of the Court of the Subordinate Judge of Negapatam in O. S. No. 94 of 1912.

T. R. Venkatarama Sastri for Appellants.

T. V. Gopalaswami Mudaliar and *A. Ganesa Iyer* for Respondents.

The Court delivered the following

Judgment:—The 1st respondent is declared to be of age and allowed to proceed with the appeal. A vakalat has been filed on his behalf.

In this case, the plaintiff-appellant sued on a promissory note under the Summary procedure prescribed by Order XXXVII of the Civil Procedure Code and obtained a decree. The 1st defendant did not obtain leave to contest the suit and after the decree he applied under Order XXXVII, Rule 4, Civil Procedure Code for setting aside the decree. The decree was set aside on

*S. A. No. 854 of 1915 22nd December 1916.

1. (1900) 2 Q. B. 211. 2. (1892) 1 Q. B. 94.

3. (1915) 32 I. C. 190.

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his depositing into court the amount sued for. Then the suit was tried again and judgment given against him (1st defendant). His brother who was the 3rd defendant in the original suit claimed that the money which was deposited by the 1st defendant belonged to the joint family and was not therefore available to the plaintiff, his judgment creditor. The Subordinate Judge disallowed this contention, but the lower appellate Court while observing that the question really did not arise in the suit itself but was one to be settled in execution, held that if the money came from the joint family property, the plaintiff, *i.e.*, the appellant was not entitled to it. We think this view of the law is wrong. The money was deposited clearly as security for satisfying any judgment that might be passed against the 1st defendant and the deposit made a condition precedent to the setting aside of the decree originally passed by the Subordinate Judge. The point is covered by a decision of this court in L. P. A. No. 364 of 1914 where Mr. Justice Sadasiva Aiyar and Mr. Justice Napier held that the decree amount in cases of this nature must be regarded as being charged on the money deposited. Rule 4 of Order XXXVII, Civil Procedure Code corresponds to Rule 6 of Order XIV of the English Judicature Act and it has been decided under this rule that the money deposited would not belong to the trustee in bankruptcy of the defendant but to the plaintiff in the suit who has succeeded in obtaining Judgment. *In re Ford: Ex parte. The trustee.* [1] There is also another decision of the English Court very much in point *Bird* v. *Barston* [2]. There money was deposited by a married woman and the question was afterwards raised that it was not available to the plaintiff inasmuch as it was the separate property of the woman. Lord Esher M. R. in disallowing the contention held that no such enquiry should be embarked on inasmuch as the money was deposited for the express purpose of the suit. The learned pleader for the 1st respondent has relied on a ruling of the learned Chief Justice and Mr. Justice Seshagiri Aiyar in *Errikulappa Chetty* v. *Official Assignee, Madras* [3]. Here money was deposited under rule 5 Order XXXVIII, Civil Procedure Code as security against removal of the property of the defendant sought to be attached before judgment, from the jurisdiction of the Court. There in making the deposit all that the defendant undertook was that he would not

1. (1900) 3 Q. B. 211. 2. (1892) 1 Q. B. 94.
3. (1915) 32 I. C. 190.

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remove the property which was sought to be attached from the jurisdiction of the Court; and if he satisfied that undertaking it could not be said that the amount deposited should be available in any way to the plaintiff in the suit if he recovered judgment. This is pointed out by both the learned Judges who held that the money deposited was available not only to the plaintiff in the suit but also to other creditors of the defendant. That is quite different from the present case. Here, the money was deposited in Court for the purpose of satisfying the decree passed in the suit. There would be no use in ordering the defendant to make a deposit of money as security in such cases as this if when judgment is passed the decretal amount cannot be treated as a charge on the deposit. The case may be different, though it is not necessary to express any opinion with regard to that question, if what is furnished as security is specific property such as land. In such a case it might be possible to contend that the defendant is not in fact owner of the property but somebody else and that the title of the real owner would not be lost. But money stands on a different footing; it is capable of being passed from hand to hand and it is hard to conceive that where the legislature has required that in certain circumstances the defendant should deposit as security, in order to secure to the plaintiff his rights on recovering judgment, that an enquiry was to be instituted as to how or from what source the defendant obtained the money. The whole object of requiring security in these cases would be frustrated if such an enquiry was admissible.

The appeal is allowed and the decree of the Subordinate Judge restored with costs here and in the court below.

A. S. V.

PRIVY COUNCIL.

Present:—Lord Parker of Waddington, Lord Sumner, Sir John Edge and Sir Lawrence Jenkins.

[On Appeal from the High Court of Judicature at Fort William in Bengal].

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Kumar Basanta Kumar Roy v. The Secretary of State for India.

Kumar Basanta Kumar Roy and others ... *Appellants**

v.

The Secretary of State for India and others ... *Respondents.*

Alluvion and Diluvion—Reformation in situ—Limitation—Burden of proof—Dispossession—Exclusive adverse possession—Indian Limitation Act, (Act 15 of 1877)—Section 2 and Schedule 2, Arts, 142, 144.

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*21st and 22nd November 1916 and 1st February 1917.

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A chur which was found to be a reformation in situ of plaintiff's land was occupied for some years by Government. It was then claimed by defendants as their property, and Government made over possession to them. On plaintiffs suing to recover possession, defendants pleaded limitation and to make out their plea claimed to tack on to their own occupation the period of Government's possession

Held, that the defendants did not derive their liability to be sued " from or through " the Revenue authorities within the meaning of S. 2 (4) of the Indian Limitation Act and that their plea must fail.

The Limitation Act of 1877 does not define the term "dispossession," but its meaning is well settled. A man may cease to use his land because he cannot use it, since it is under water. He does not thereby discontinue his possession: constructively it continues, until he is dispossessed; and, upon the cessation of the dispossession before the lapse of the statutory period, constructively it revives. "There can be no discontinuance by absence of use and enjoyment, when the land i not capable of use and enjoyment" It seems to follow that there can be no continuance of adverse possession, when the land is not capable of use and enjoyment, so long as such adverse possession must rest on *de facto* use and occupation. When sufficient time has elapsed to extinguish the old title and start a new one, the new owner's possession of course continues until there is fresh dispossession, and revives as it ceases.

Leigh v. *Jack*, (1879) L. R., 5 Exch. Div., at p. 274. Followed.

Appeal from a decree of the Calcutta High Court dated July 12, 1909, reversing a decree of the Subordinate Judge of Nuddia.

A certain Zamindari of the Hooghly District was long divided into two separate mahals, known as Lot Mahomed Aminpur and Lot Gobindpur respectively. Plaintiffs Appellants are the proprietors of a half of Lot Mahomed Aminpur, the owner of the other half being Maharajah Sir J.M. Tagore. The respondents other than the Secretary of State, the Kundu Babus, are proprietors of Lot Gobindpur.

The lands in suit were alleged by plaintiffs and admitted in the first Court by defendants to be reformations in situ of diluviated lands of three mouzahs which admittedly appertained as to 10 annas to Lot Mahomed Aminpur and as to 6 annas to Lot Gobindpur.

The lands reformed gradually from about 1889 onwards. A chur formed and increased year by year; for some years it was entirely submerged in the rains. The revenue authorities at first settled annually so much as was cultivable with the actual cultivators on the *utbandi* system, and later made longer settlements. Up to 1894 plaintiffs were minors under the Court of Wards.

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About 1903 both plaintiffs and the Kundu Babus laid claims to the lands. Government allowed the claim of the Kundu Babus and delivered possession to them.

Thereafter, in 1904, appellants sued the Kundu Babus, the Secretary of State, and the actual ryots to recover possession also impleading their co-owner, the Maharaja. The Kundu Babus (hereinafter described as the respondents) denied Plaintiffs' title and pleaded *inter alia* limitation on the ground of adverse possession.

The subordinate Judge held that plaintiffs' title was made out and that the suit was not barred by limitation. He gave plaintiffs a decree. On appeal his decision was reversed by the Calcutta High Court (Chitty and Carnduff, JJ.) who held that Government were in possession of portions of the land from 1889 adversely to plaintiffs, and (impliedly) that such possession was continuous. They further held that the burden of proving that the possession of Government and the Respondents did not extend for 12 years to the whole of the land lay on the plaintiffs and had not been discharged. They dismissed plaintiffs' suit. Hence this appeal.

Sir R. Finlay, K. C., and *Kenworthy Brown*, for appellants: There are two questions in this case (1) title; (2) limitation. Title has been found in our favour by the Sub Judge. The High Court indicated some doubts, but did not overrule his findings. Limitation was decided in our favour by the Sub Judge, but against us by the High Court.

Art. 144 of Schedule 2 applies. The High Court have erroneously allowed respondents to reckon in the time during which the chur was in the possession of Government. Government was in no sense respondents' predecessor any more than they were ours.

Further, plaintiffs were all infants under the Court of Wards, and Government could not hold possession adversely to their own wards.

In addition, plaintiffs and some of the respondents were tenants in common, and the receipt of rent by one tenant in common, does not in India amount to exclusion of the others.

(*Sir Lawrence Jenkins* referred to *Trustees and Agency Co.* v. *Short* [1]. It has been held in India that where there has

1 (1888) L. R. 13. A. C. 793.

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been a long exclusive possession you may presume an ouster, but that ouster does not begin from the commencement of the exclusive possession).

There is nothing in India corresponding to 3 and 4, Will 4 Ch. 27, nor is there any decision as to the time after which ouster is presumed.

The burden of proving adverse possession is on the respondents—*Radha Gobind Roy* v. *Inglis* [1]; *Secretary of State for India* v. *Chelikani Rama Rao*, [2]. The 12 year's adverse possession required by Art. 144 must be 12 years adverse possession by the defendant or by some one through whom he claims, Vide, definitions of "defendant," "plaintiff", in S. 2 (4) and (8) of the Indian Limitation Act.

Adverse possession by a series of independent trespassers confers no right on any one of them who has not himself had uninterrupted possession for the period required by law.

Dixen v. *Gayfere,* [3] (though Cockburn, C. J. commented adversely on this case in *Asher* v. *Whitleok,* [4]) *Trustees and Agency Co.* v. *Short,* [5].

Here there was no possibility for any one to have continuous possession for 12 years before suit, as the whole chur was periodically submerged up to a later date. Such submergence determines the possession of a trespasser. *Secretary of State* v. *Krishnamani Gupta* [6].

Under the present law of limitation plaintiffs need not prove they were in possession within 12 years of suit, they may sue within 12 years from the time when the possession of the defendant or some person through whom he claims, becomes adverse to them. *Rao Karan Singh* v. *Raja Bakar Ali Khan* [7].

Art. 144 as to adverse possession only applies when there is no other article which specially provides for the case. *Nawab Muhammad Amanellah Khan* v. *Badan Singh* [8].

The law is not the same when the rightful owners sue ryots to recover possession. There the plaintiffs must prove

1. (1880) 7 C. L. R. 364. 2. (1916) 43 I.A. 192 (203, 204)=31 M.L.J. 386.
3. (1853) 17 Beavan 421, 430. 4. (1865) L. R. 1 Q. B. 1 at p 4.
5. (1888) L.R. 13 A. C. 793. 6. (1902) L. R. 29 I. A. 104=29 Cal 518.
7. (1882) L. R. 9 I A. 99=5 All. 1. 8. (1889) L. R. 16 I A. 148.

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possession within 12 years of suit:—*Mohima Chunder Majumdar* v. *Mohesh Chunder Neogi*, [1]. But that is because Art. 142 applies. Here the Art. applicable is 144.

The view that the onus in such a case lies on defendant was adopted in *Innasimuthu Udayan* v. *Upakarathudayan*, [2]. Where, however it was held that he had sustained it.

Here the respondents are quite unable to sustain the onus. The plaintiffs were wards of Court, and it was the duty of Government to look after them. Government never intended to set up a claim against them. Respondents did not claim under Government but against it.

Further, the possession of a tenant in common is for all the tenants, not for himself alone.

As to a small portion of Hatikanda, one of the three mouzas in suit, there is no defence, as Government did not release it till 1904.

Respondents in their "case" lodged before this Board dispute the identity of the lands, As to propounding riddles of this kind Vide *Rajcoomar Roy* v. *Gobind Chunder Roy*, [3],

Kenworthy Brown followed:—A large portion of the land in suit emerged after Government gave up possession, and the emergence is still going on.

It may be true that under the old law the burden of proof in these cases lay on the plaintiff to prove possession within 12 years of suit.

Maharajah Kunwar Nitrasen Singh v. *Nund Lall Singh*, [4].

Kumar Ranjit Singh v. *Schoene Kilburn & Co.*, [5].

The latter case was two or three years before this Board's decision in *Rao Karan Singh* v. *Raja Bakar Ali Khan* [6] and was under the old Limitation Act. Until 1881 the view then taken prevailed to some extent even under the new Act: but the law was altered in 1871 by Act 9 of 1871, and this was clearly laid down by this Board in *Rao Karan Singh* v. *Raja Bakar Ali Khan* [6].

The respondents now dispute the identity of the lands and

1. (1888) L. R. 16 I. A. 23, 26.
2. (1899) L.R. 26 I.A. 210=I L.R. 23 M. 10.
3. (1892) L. R. 19 I. A. 140 (146, 149).
4. (1860) 3 M. I. A. 199, 220.
5. (1879) 4 C. L. R. 390.
6. (1882) L. R. 9 I. A. 99.

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claim that a great part of them are part of an older chur which they occupied long ago. This is a new case altogether.

The evidence shows that up to 1893-4 only a very small portion of these lands had emerged at all. At the time when Government gave over possession even this much was completely under water from June to October. It was not possible therefore for a title by adverse possession to be acquired. Disturbance by *Vis Major* of the flood is tantamount to abandonment, and interrupts continuous possession. *Secretary of State* v. *Krishamani Gupta* [1].

The duration of the abandonment is immaterial. The principle applies whether it is for 150 days or for several years.

(*Lord Sumner*:—It would seem that even if Government ever asserted adverse possession they abandoned it.)

Lord Canning by a proclamation cancelled all titles in Oudh. When that proclamation was withdrawn as to Lucknow the intervening time was simply wiped out. *Prince Mirza Jehan* v. *Nawab Afsar Begum* [2].

(*Lord Sumner*:— The Collector's order is simply a formal way of retiring from possession and leaving those entitled to possession to take it.)

As to possession of co-owners, the fundemental rule is that possession by one will not be presumed to be adverse to the others, but will ordinarily be held for the benefit of all. *Jogendra Nath Roy* v. *Baldeo Das* [3] where the previous cases are discussed. The same case lays down another proposition on which we rely, viz., that the doctrine of constructive possession applies only in favour of a rightful owner (p. 972). Even if Government were in possession of a small fragment adversely, that was not possession of the whole. (*Lord Sumner*. Some of the lands which have emerged belonged to two other mouzas altogether, and for all the evidence there is to the contrary the lands occupied before 1894 may have been that part).

O' Gorman for respondents: I contend that the whole of these three mouzas belonged to lot Gobindpur, not merely 10 annas. If these villages had been divided into 10 annas and 6 annas, the proportions of revenue would have been the same.

1. (1902) I. L. R. 29 C. 518.
2. (1878) L. R. 6 I. A. 76.
3. (1907) I. L. R. 35 C. 961.

[*Lord Parker* :—The assessment is on the whole mahals, not on particular villages.]

The plaintiffs have not made out their title to these three mouzas. They have never produced any document showing they were registered as proprietors under the Bengal Registration Land Act of 1876. Certain papers they did in fact produce, but the Judges of the High Court were not satisfied that these papers made out their case.

[*Lord Sumner* :—It is a question of fact. The first Court is satisfied. The second Court have criticised the Sub-Judge's methods but have not taken upon themselves to say he was wrong. Do you want us to send the case back ?. It began in 1904].

We produced our copy of the General Register, and their omission to do the same raises a strong presumption that they were not owners of the 10 annas as they alleged.

Next, we allege that we were in possession of this land or a part of it since 1866. This appears from Map. No. 14.

[*Lord Parker* :—I can't find anything about that in the pleadings or in your case.].

[*Lord Sumner* :—Is there anything in the whole record, except the Maps, to show that you had or claimed possession in 1886?.]

De Gruyther, K. C., (intervening) : We propose to show that plaintiff's claim includes more than is in the new Chur, Chur Raninuggur No. 2.

[*Lord Sumner* asked Sir R. Finlay if he claimed any more of the land than was in Chur No 2.]

Sir Robert Finlay : We believed and believe that it is all Chur No. 2, but we do not abandon any party of our claim.

[*Lord Parker,* I can't find their point intelligibly raised anywhere.]

[*Sir Robert Finlay* :—I submit it is not open to them.]

Plaintiffs would not at first state the boundaries intelligibly; hence we could not tell what they claimed.

Counsel went into the Maps and other evidences and contended that most of the land in fact fell within Chur No. 1.

The Article of the Limitation Act to be applied even as regards Chur No. 2, still more as regards Chur No. 1, is Art. 142, not Art. 144. Plaintiffs have been dispossessed within the

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meaning of Art. 142 more than 12 years before suit and are barred. *Nawab Muhammad Amanullah Khan* v. *Badan Singh* [1].

There is no question of co-ownership in the ordinary sense; the estates are separate and the owners pay separate revenue.

Even if Art. 144 applies, Government has held adversely for 12 years. The possession of Government is my possession. Government took possession not on behalf of anybody else, but as owner or proprietor, it was asserting its right under Bengal Regulation 11 of 1825, S. 4. Even as regards Chur No. 2 regular tenancy commenced in 1891, and before that date there had been *utbandi* tenancy. If the plaintiffs had sued Government only in 1904, their suit would have been dismissed. Their title has been extinguished under S. 28 of the Limitation Act, and cannot be revised.

As to title, their case is that we have 6 annas only of these three mouzas. The Copy of the General Register produced by us shows that we are entitled to the whole 16 annas.

Their Lordships' judgment was delivered (February 1, 1917) by

Lord Sumner.

Lord Sumner;—This suit was brought by members of a family called the Kumars of Dighapatia against certain persons, called collectively the Kundu Babus of Mahiari, to recover khas possession, jointly with their co-sharer maliks, of a 10-anna share in portions of mouzahs Durlabhpur, Jirat, and Hatikanda. Wasilat was also claimed. Some years ago the Ganges overflowed these lands. They have now reformed *in situ*.

The plaintiffs held one moiety of the zamindari lot Mahomed Aminpur, the other moiety being held by various persons, who were joined as subordinate defendants. To this mahal, bearing Towzi No. 3989 of the Hooghly Collectorate, this 10-anna share was said to have belonged for at least a century. The 6-anna share was the property of the principal defendants in right of their zamindari, *viz.*, lot Gobindpur bearing Towzi No. 100. The Trial Judge found for the plaintiffs' title. The High Court criticised this decision as having been arrived at "without any real discussion or consideration of the documentary evidence," but did not expressly dissent from it. They allowed

1. (1889) L. R. 16 I. A. 148.

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the appeal on another ground. Having examined the documentary evidence in question with some care, their Lordships conclude that the decision of the Trial Judge in this regard was right.

The plaintiffs put in an extract from the Quinquennial Register of pergunnah Mahomed Aminpur, for A.D. 1816, which showed that a 10-anna share in each of the three mouzahs then belonged to Taluq Mahomed Aminpur. An extract from the Mahalwari Register, apparently for A. D. 1880, showed these mouzahs still belonging to Mahomed Aminpur, though not under the same Towzi number, and stated the maliks, as recorded in the General Register, to be certain persons of whom one was Purna Chandra Roy, the plaintiffs' predecessor in title. It further remarked that part or all of the land of these mouzahs was ijmali, without naming either the co-sharers or the proportions of the shares. No doubt these entries are in some respects inconclusive. For several years, from 1888 onwards until 1894, when the guardianship of the Court ended, the plaintiffs were minors, whose property was in the charge of the Court of Wards, and they produced documents showing that year after year each of these mouzahs was administered on their behalf, and that rents and profits collected in respect of them were credited to the account of the plaintiffs. Amdanis of money on account of rent, Towzi accounts, extracts from the jumma-wasil-baki accounts and karcha accounts were forthcoming in regular sequence, in which, the plaintiffs were stated to be proprietors and their share to be a 10-anna share in Towzi No. 3989. To these proofs of enjoyment no real answer was made, and their Lordships see no reason to question the finding of the Trial Judge in favour of the plaintiffs' title.

The identity of the lands in suit held by the principal defendants with those originally washed away, to which the plaintiffs made title, was accepted by the Trial Judge, doubted but not decided by the High Court, and strenuously contested before their Lordships. Before the trial an ameen was appointed to survey the *locus in quo* and set it out on a map. The limits of the ground in dispute were agreed and shown on this map. Portions of each of the three mouzahs fell beyond them. At the instance of the principal defendants the ameen also prepared a map purporting to show the natural features "as contained in the release map of 1886." In his report he stated that the

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latter features depended on the position of a palm-tree, which was taken as the datum because it was said to be the only thing that had survived from 1886, and to be identical with a palm-tree shown on a copy map produced by the defendants and alleged to be a map of things as they were in that year. No proof of the identity of this palmtree was forthcoming; no thak map was produced; no release of 1886 or any evidence of it was put in. It is plain that the ameen thought that this map of the supposed features of 1886 was not worth much, and their lordships think so too.

The respondents' argument rested on three points: first, that since 1886 they had been, as they said, in possession of certain portions of a chur known as Chur Raninuggur No. 1, that by superimposing the ameen's 1886 map on his survey of 1906, it would be seen that part of the area disputed in this action, though claimed as part of Chur Raninuggur No. 2, really fell within Chur Raninuggur No. 1, and that there had been a confusion of mouzah Jirat, which lay in the north of the disputed area, with an area called Chur Jirat, which lay outside of it and to the south, some miles away. Their Lordships' Board has had occasion before now in *Rajcoomer Roy's Case*, [1] to deprecate the practice of "propounding riddles of this kind," and to point out how rarely they succeed. It may be doubted if such efforts are worth the labour they involve. After the best consideration that they could give, their Lordships are clear on one point only, namely, that this case was not made at all at the trial, and is not made out now. The Trial Judge regards that, "it is admitted on both sides that the lands in suit are reformations on their old sites of diluviated lands of mouzah Durlabhupur, Jirat, and Hatikanda." On that admission he proceeded, and by that admission, in their Lordships' opinion, the respondents must be bound. In the result the plaintiffs have made out their case alike as to title and parcels.

There remains the question on which alone the High Court proceeded, the question of limitation. This involves some account of the history of the reformed land. At the date of the Government survey of 1869 and 1870 the three mouzahs lay to the west of the Bhaghirati. Shortly after that date the river began to traverse bodily to the south-west, in a direction at right angles to the axis of its course at that part of the stream, and

1. (1892) L. R. 19 Ind. App., at p. 146.

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steadily moved for some miles across country till in 1906 only portions of Jirat and Hatikanda, and no part of the Durlabhpur were any longer to the west of the river. The total area submerged no doubt extended far beyond the bounds of these mouzahs. As the river passed on churs began to form. Chur Raninuggur No. 1 was the first; Chur Raninuggur No. 2, somewhere within which the present reformations fall, began to appear as an island chur in 1888. The plaint in the present suit was filed on the 6th September, 1904. It is common ground that the period of limitation applicable is twelve years, the contest being whether article 142 of Schedule II of Act XV of 1877 is the article applicable or article 144. The critical time is the time prior to the 6th September, 1892.

A great body of evidence was called, of which the Trial Jude says that the witnesses "have sworn hard without any regard to truth." Neither side has ever thought it worth while to quote what they said to their Lordships. If the appellants are right, the question is whether the respondents had adverse possession before September 1892; if the respondents are right, the question is whether before that time the appellants had not been dispossessed. A good deal has been said about the burden of proof in either case, but as their Lordships find the evidence sufficient to establish a clear conclusion of fact, it cannot matter now by which party it was given. Their Lordships accordingly pass by the question who would have suffered if the facts had turned out otherwise or had not been proved at all, and proceed to examine them.

The best evidence of the history of the chur lands in question is to be found in the Collectorate reports of the Settlements of 1894, 1899 and 1902. An island chur in or about this spot was thrown up in 1888, but was unfit for assessment, and apparently for cultivation, till 1890. At first the surrounding water was unfordable on all sides, but further accretions soon attached it on the north to Chur Raninuggur No. 1. In 1889 it was first treated as an accretion to Chur Raninuggur No. 1 and Jirat, which had been released to Suksagar zamindars, as reformations *in situ* of their mouzahs, and then shortly afterwards came to be considered as an accretion to the part of Chur Raninuggur No. 1, which was a Government estate. It was not regularly surveyed till 1894, but, beginning in the year 1891-1892, it was under direct management

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on the utbandi system on yearly settlements. The area then producing a rent was about 350 bighas; in the following year it was slightly more. On the survey in 1894 the area of this chur was found to be 2,060 bighas, of which 583 were by this time under cultivation. The residue was uncultivated jungle, and the whole of it was every year completely under water from the beginning of June to the end of October. Naturally, the land was then very poor, and there was no resident raiyat in the mahal.

The chur had so far increased by 1894 that a raiyatwari settlement was then made with the utbandi raiyats for a term of five years. On the expiration of this term it was again surveyed, and its area was found to have increased to over 3,000 bighas, and 86½ acres of it were released to the proprietor of estate No. 399, as being land which was a reformation *in situ* of his mouzah Sardanga. It would seem that a further portion of it had been previously released to the owner of mouzah Baliadunga. The cultivable lands were then settled again for an undefined term.

In 1902 the principal defendants petitioned the Collector of Nuddia for the lease to them of the lands in question, alleging that they were reformations *in situ* of lands belonging to their estate, lot Gobindpur, Towzhi No. 100, and ten months later the officiating collector granted the petition. In his judgment the petitioners had proved their title and the identity of the reformed lands, and the Government could not legitimately resist their claim. Accordingly possession was delivered in due form, by planting a bamboo on the estate, by proclamation, and by beat of drum.

The report of 1899 in terms speaks of these reformed lands as being the "property" of the Government resumed in 1888, which at most means that in time the Government's actual possession, such as it was, might be expected to ripen into ownership. The report of 1902 speaks of possession, direct management, and settlement. The order of 1903, while avoiding the term "property," because it recognised the property of the petitioners, recited that the Government took possession of Chur Raninuggur No. 2 in 1888, the year in which it came into existence as a chur. These documents, however, were reciting what had happened some years before, and presumably after some change of collectors in the meantime and it is very noticeable that in the khasras of the chur the column headed "Name of proprietor

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and landlord," appears to have been left blank until 1899, when it is filled in for the first time with the name of the Empress of India.

The Limitation Act of 1877 does not define the term "dispossession," but its meaning is well settled. A man may cease to use his land because he cannot use it, since it is under water. He does not thereby discontinue his posseesion: constructively it continues, until he is dispossessed; and, upon the cessation of the dispossession before the lapse of the statutory period, constructively it revives. "There can be no discontinuance by absence of use and enjoyment, when the land is not capable of use and enjoyment" (per Cotton, L. J., in *Leigh* v. *Jack* [1].). It seems to follow that there can be no continuance of adverse possession, when the land is not capable of use and enjoyment, so long as such adverse possession must rest on *de facto* use and occupation. When sufficient time has elapsed to extinguish the old title and start a new one, the new owner's possession of course continues until there is fresh dispossession, and revives as it ceases.

In the case of Krishnamoni Gupta (L. R. 29 Ind. App. 104), their Lordships' Board applied this view to a case, where a river shifting its course first in one direction and then in the opposite direction, first exposed certain submerged lands, of which the Government took possession, and then after a few years flooded them again. No rational distinction can be drawn between that case and the present one, where the reflooding was seasonal and occurred for several months in each year. It was held that when the land was re-submerged the possession of the Government determined, and that, while it remained submerged, no possession could be deemed to continue so as to be available towards the ultimate acquisition of title against the true owner.

Again to apply the test suggested by Bramwell, L. J., in *Leigh* v. *Jack,* at p. 273, "to defeat a title by dispossessing the former owner, acts must be done, which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it," and therefore it is necessary to look at the position in which the former owner stands towards the land, as well as to the acts done by the alleged dispossessor. "It is impossible," says Lord Halsbury in *Marshall* v. *Taylor* [2] "to

1. (1879) L. R. 5 Exch. Div. 264 at p. 274. 2. (1895) 1 Ch. at p. 645.

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speak with exact precision about the degree of possession or dispossession that will do, unless you have regard, as Lord Justice Cotton said in *Leigh* v. *Jack*, to the nature of the property." An exclusive adverse possession for a sufficient period may be made out, in spite of occasional acts done by the former owner on the ground for a specific purpose from time to time. Conversely acts which *primâ facie* are acts of dispossession may under particular circumstances fall short of evidencing any kind of ouster. They may be susceptible of another explanation, bear some other character or have some other object. In the present case beyond the temporary utbandi cultivation itself there is nothing down to 1892 to show an exclusion of the plaintiffs by the Revenue authorities.

Their Lordships are of opinion that, whatever may have been the case later on, there had not been, down to September 1892, any dispossession of the plaintiffs within the meaning of article 142. The evidence of possession by the Government consists in the direct management under which bandobastdars cultivated at annual rents. Two collectors' orders, dated in 1889, are referred to, but not exhibited, under which the land was first of all "treated" as an accretion to one property and almost immediately afterwards "considered" as an accretion to another; but, beyond the utbandi cultivation, nothing was done. Whether the land cultivated was the same each year or not does not appear; at any rate, it was annually submerged, and there are no circumstances to link together various portions of ground, so as to make the possession of a part, as it emerged, amount constructively to possession of the whole (*Mohini* v. *Promoda* [1]. The lands in question in this suit form only a part of Chur Raninuggur No. 2. It cannot be shown that they formed part of the land cultivated, or of the chur which had emerged up to 1892. It is quite possible that most, if not all, of the land, cultivated between 1891 and 1893 may have belonged to the land, which was shortly afterwards released to the Baliadunga and Sardanga *zamindars*. It is clear that in those early years there was considerable uncertainty as to the course the reformation was taking, and the fact must have been well known that the chur might turn out to be a reformation *in situ* of the land, which had only diluviated within the previous twenty years.

1. (1896) I. L. R. 24, C. at p. 259.

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If, as their Lordships think, no dispossession occurred, except possibly within twelve years before the commencement of this suit, article 144 is the article applicable, and not article 142. It is not easy to see in the circumstances of a case such as this how conduct insufficient to evidence dispossession of the plaintiffs can be used to evidence adverse possession available to the defendants; but, be that as it may, in their Lordships' opinion the defendants' contention resting on article 144 fails on another ground. The period of time requisite to bring the defendants under the protection of article 144 cannot be made out, unless to the period during which the defendants have been in possession there is tacked, out of the prior period when it is contended that the Revenue authorities had possession, a number of years going back to 1892. The definition section, S. 2, shows that in the present case this cannot be done. The defendants do not derive their liability to be sued "from or through" the Revenue authorities in any sense of the words. They advanced a claim of their own adversely to the Revenue authorities, which was rested on prior title and possession, and sought to put an end to conduct on the part of those authorities which, they asserted, was inconsistent with and an invasion of their own superior title. On investigation the Revenue authorities recognised and submitted to this adverse claim and withdrew from any enjoyment or occupation. If the defendants could make good now the claim which they made then, well and good; but they would succeed, not by reason of, but independently of, the Limitation Act. Upon this ground they fail as far as article 144 is concerned.

In this view of the case it is not necessary to decide two points much discussed before their Lordships: first, that the defendants' possession could not, as such, be deemed to be adverse to their co-sharers or available to deprive the plaintiffs of their rights; and second, that the possession of the Revenue authorities could not be availed of against the plaintiffs by reason of being at the time minors under the guardianship of the Court of Wards. In differing from the High Court upon the determination of the appeal, their Lordships do not wish to be taken as expressing any opinion adverse to their view on this second point,

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In the result their Lordships will humbly advise His Majesty that the appeal should be allowed with costs, the judgment of the High Court should be set aside with costs, and the decision of the Trial Judge should be restored. As the first defendant on the record, the Secretary of State for India in Council, lodged no case and did not appear before their Lordships to support or resist the appeal, their Lordships do not advise that the terms of any order as to costs should affect him.

Solicitors for Appellants :—*Watkins & Hunter.*

Solicitors for Respondents :—*T. L. Wilson & Co.*

A. P. P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sadasiva Aiyar.

The Firm of Ramakrishna Aiyar represented by its two partners (1) S. Rama Aiyar and another	*Petitioners* * (*Respondents 1 and 2 in A. A. O. No. 407 of 1914 on the file of the High Court*).
v.	
The Official Receiver of Tinnevelly.	*Respondent* (*Appellants in do*).

Rama Aiyar v. Official Receiver of Tinnevelly.

Practice—appeal—Parties—Official receiver appealing to High Court—Resignation of that official receiver and appointment of another—matter represented to the Court—Order to delete the name of the official receiver that resigned—Judgment and decree wrongly mentioning the old receiver by name—Validity of.

Where an appeal is preferred to the High Court by an official receiver under the Provincial Insolvency Act, described on the record as " G, the official receiver " and he resigned his post subsequently and another was appointed official receiver and this matter was represented to the High Court and it was directed that the name of the official receiver who filed the appeal should be deleted, but the judgment and the order wrongly gave the name of the official receiver that had resigned, the error in the judgment and the order was a mere clerical error and ought to be corrected ; and the judgment and order are not vitiated by the error.

Quaere. Whether a decision is vitiated by reason of not bringing on record the succeeding official receiver under the Provincial Insolvency Act, when the appeal had been filed by his predecessor. Differences in language between the Presidency Towns Insolvency Act and the Provincial Insolvency Act pointed out.

Application under O. 27 Rule I of the Civil Procedure Code for review of the Judgment of the High Court, dated the 4th day of February 1916, in A. A. O. No. 407 of 1914 presented against the order dated the 15th September 1914 of the District Court of Tinnevelly in O. P. No. 755 of 1913.

*C. M. P. No. 2248 of 1916. 16th January 1917.

Rama Aiyar v. Official Receiver of Tinnevelly.

T. R. Venkatarama Sastri, E. S. Chidambaram Pillai and *S. Anantarama Aiyar* for the Petitioners.

M. D. Deva Doss for the Respondents.

The Court delivered the following

Sadasiva Aiyar, J.

Judgment:—*Sadasiva Aiyar, J.*—This is a petition for review of the judgment pronounced by myself and Moore, J. on the 4th February 1916 in A. A. O. No. 407 of 1914.

That appeal was preferred by one Mr. Gopaliah (then Official Receiver of Tinnevelly) against the order passed by the District Judge of Tinnevelly refusing the receiver's application made under S. 37 of the Provincial Insolvency Act III of 1907 to annul certain alienations made by an adjudicated insolvent in favour of one of his creditors, (namely, the firm represented by the respondents 1 and 2) within three months before the adjudication).

Pending A. A. O. No. 407 of 1914 in this Court, Mr. Gopalaiah, the Official Receiver resigned his post and a new Receiver was appointed by the Local Government for the Tinnevelly Division. The appeal came on for hearing before myself and Moore, J. on the 4th February 1916. Mr. Deva Doss had filed the appeal for Mr. Gopalaiah, the then Official Receiver. I accept Mr. Deva Doss's statement that on 4-2-1916 he represented to us that Mr. Gopalaiah had resigned his post of Official Receiver and that another gentleman (Mr. S. Subramania Aiyar) had been appointed as Official Receiver, that a doubt was suggested before us by the learned Counsel whether it was necessary to have the name of the new Official Receiver substituted for that of Mr. Gopalaiah in the appeal records before the appeal could be heard and that we intimated that all that was necessary was that instead of the appellant being described as Mr. P. A. Gopalaiah, Official Receiver of Tinnevelly thereafter, he might be described simply as the Official Receiver of Tinnevelly.

I also accept Mr. Deva Doss's statement that he represented to us that he had instructions to continue the appeal on behalf of the then Official Receiver.

After hearing both sides fully we allowed the appeal and declared the alienations made by the insolvent to the firm of the respondents 1 and 2 void as against the Official Receiver.

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In drawing up the fair copies of our Judgment and order, the office had repeated the name of Gopalaiah before the description of the appellant as the Official Receiver of Tinnevelly. That is a clerical error which must be corrected.

This petition of review is filed by the firm of S.R.M.V.S.S.V. Ramakrishna Aiyar who are the respondents 1 and 2 in the appeal. The Official Receiver of Tinnevelly is the Respondent in this review petition which does not mention the Official's, individual name. The only arguable ground on which this review petition is sought to be supported is the first ground which is as follows:—"The decision of the learned Judges is vitiated in law in that the appellant had resigned and so had no locus standi to appear and the new Receiver was not brought on record before the case was heard."

It is argued in support of this ground that the decision in *Akula Paradesi* v. *Dhelli Jagannadha Row* [1] constrains me to hold that the appeal was heard in the absence of the proper party as appellant and that the devolution of interest to the next Receiver was of such a kind that the old Receiver could not continue to represent the interests involved in the appeal even for the purpose of the further conduct of the appeal. The Calcutta Case reported in *Rai Charan Mandal* v. *Biswanath Mandal* [2] considers devolutions of interest through transfers of the interests of private parties. So far as such litigation is concerned the original parties can continue the litigation effectively.

The decision in *Akula Paradesi* v. *Delli Jagannadha Row* [1] however draws a distinction between the continuation of litigation by a private person whose interest has ceased through assignment or devolution and the continuation of litigation by one whose right to conduct the litigation was based solely on his character of a Receiver or Trustee appointed by the Court and whose character as such ceased during the pendency of the litigation. The learned Judges say that in the latter case "the law necessarily implies the absence of all interest in the subject of litigation" when the official capacity of the party litigant whose name is on the record terminates and that his continuance of the litigation after such termination would be futile save in very exceptional cases as "where the right of action accrued by virtue of mere possession or by virtue of their being contracting parties themselves" and so on.

1. (1904) I. L. R. 28 M 157. 2. (1915) 26 I. C. 410.

Rama Aiyar v. Official Receiver of Tinnevelly.

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Mr. Deva Doss argued contra that the case of *Akula Paradesi* v. *Dhelli Jagannadha Row* 1 related to a Receiver appointed under S. 503 of the old Civil Procedure Code for a particular suit or particular suits and that the ratio of that decision could not apply to an Official Receiver in whom ex officio all the properties of the insolvent become vested and who by reason of the office becomes entitled to institute and continue suits. Mr. Deva Doss relied upon the analogy of the Official Assignee on the Original Side of the High Court, of the Advocate General, the Administrator General and so on who bring and defend suits in their Official designations and whose successors are entitled to continue the conduct of the litigation (according to what Mr. Deva Doss alleged was the uniform practice) without their successor's names being brought on the record.

I am not well acquainted with the practice as regards suits brought by or against the Official Assignee of Madras or the Advocate General, or of the Administrator-General where there has been a change of officers pending the litigation and I shall not express any opinion as regards the legality of the practice alleged by Mr. Deva Doss assuming it to exist. It seems, however, that a distinction might be fairly drawn between the position of the Official Assignee in Madras and the position of an Official Receiver in the Mofussil.

Whereas under S. 17 of the Presidency Towns Insolvency Act III of 1909 the effect of the order of adjudication is at once to vest in the Official Assignee all the properties of the insolvent, under the Provincial Insolvency Act of 1907 (S. 19 Cl. 2 read with Ss. 16 and 18) the properties of an adjudicated insolvent vest in the Official Receiver in the Mofussil only when the Court appoints a Receiver for the property of the Insolvent under S. 18 Cl. 1. (*Official Receiver of Trichinopoly* v. *Somasundaram Chettiar* 2). S. 18 cl. 1 is as follows "The court may, at the time of the order of adjudication or at any time afterwards appoint a receiver for the property of the insolvent, and such property shall thereupon vest in such receiver.") It is also to be noted that under S. 83 of the Presidency Towns Insolvency Act, the official Assignee may sue and be sued by the name of "the Official Assignee of the property of the insolvent" without mentioning his own name.

1. (1904) I. L. R. 28 M. 157.   2. (1916) 30 M. L. J. 415.

Rama Aiyar v. Official Receiver of Tinnevelly.

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Under S. 61 again, of the Presidency Towns Insolvency Act, the property of the insolvent shall pass from the Official Assignee for the time being during the continuance in office, without any transfer whatever." There seem to be no provisions in the Provincial Insolvency Act (at least none was pointed out to me). It is, however, open to argument that S. 61 of the Presidency Towns Insolvency Act was enacted merely through abundant caution and that the provision which makes the property of the insolvent vest in the Official Receiver implies that on the change of the personnel of the Official Receiver the property vests *ipso facto* in the new Official Receiver. I think it is unnecessary for me to pursue the matter further as I think that this review petition might be disposed of on another ground which I shall at once proceed to state.

At the hearing of the appeal before myself and Moore, J. it is admitted (see ground No. 2 of the review petition itself) that the resignation of the Receiver Mr. Gopalaiah was brought to our notice and also the fact that a new Receiver had been appointed. Supposing an amendment of the records became, in consequence, necessary, I think it must be taken that myself and Moore, J. treated the record as amended by striking out the name of Mr. Gopalaiah from the record and retaining only the words "Official Receiver, Tinnevelly" and that we held further that such a description represented the new Receiver sufficiently. The respondents 1 and 2 in the appeal (who are the petitioners in review) did not object to the hearing of the appeal on the footing, the appellant on the record was the new Receiver who was continuing the conduct of the appeal filed by the old Receiver and did not object that the new Receiver's name should be formally and expressly entered on the record or that his description as Official Receiver was not legally sufficient. I think that under these circumstances it must be taken that our decision was given in favour of the new Official Receiver and must be held to accrue for the benefit of the Official Receiver for the time being. I therefore dismiss this petition for review with costs.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Napier.

Arjuna Reddi and another ... *Appellants* * (*Plaintiffs*).

v.

Venkatachala Asari ... *Respondent* (*Defendant.*)

Arjuna Reddi *v.* Venkatachala Asari.

Transfer of Property Act, S. 99—Sale in contravention of—Voidable but not void—objection not taken before the confirmation of sale—Equity of redemption extinguished.

A sale in contravention of the provisions of S. 99 of the Transfer of Property Act is voidable and not void and if no objection is taken to the confirmation of the execution sale on that ground and the sale is confirmed, the mortgagor has no longer any right to redeem the mortgage.

Venkatayya v. *Surayya* 30 Mad. p. 352.

Lal Bahadur v. *Abaran Singh* 37 All. p. 165 followed.

Second against the decree of the Court of the Subordinate Judge of North Arcot in Appeal Suit No. 146 of 1913, preferred against the decree of the Court of the District Munsif of Sholinghur on O. S. No. 301 of 1912.

V. S. Govindachariar and *V. S. Kallabhiram Aiyangar* for Appellants.

K. S. Ganapathi Aiyar for Respondents.

The Court delivered the following

Napier, J.

Judgments:—*Napier, J.*:—This is a suit by the plaintiffs seeking to be allowed to redeem a mortgage executed by them (the first plaintiff and his deceased brother) in favour of the defendant on payment of the mortgage money. The defendant set up that there is no equity of redemption left in the plaintiffs by reason of the fact that he had in a suit brought by him against the mortgagors not arising out of the mortgage obtained a money decree against the mortgagors in execution of which he had himself purchased the equity of redemption. It is admitted that this sale of the equity of redemption was in contravention of section 99 of the Transfer of Property Act, which provides that whatever may be the cause of action in a suit by the mortgagee against the mortgagor, the equity of redemption cannot be sold without a suit having been instituted under section 67.

The only question is whether the equity of redemption having been sold in the previous suit in contravention of the section and the mortgagors not having objected to the confirmation of the sale, they can now exercise this remedy of redemption. It is to be

* S. A. No. 30 of 1915. 5th January 1916.

Arjuna Reddi v. Venkatachala Asari.

Napier, J.

noted that in seeking to redeem they have not offered to pay the amount for which the equity of redemption is sold.

It is argued by the appellants that the question is decided by the Privy Council in *Khiarajmal* v. *Daim* 1 and reliance is placed on passages on pp. 312 and 315. We have examined that case very carefully and it has also been considered in a later case of this court. The passage relied on by the appellants does not, we think, support them, whereas it is clearly stated in the course of their judgment by the Board that where the mortgagor has not set aside the sale he cannot exercise his right to redeem. *Vide* pages 312, 313 and 316. It is true that this decision is not on section 99. It is based on the equitable principle, which their Lordships found applicable to India prior to the passing of the Transfer of Property Act, that a mortgagee cannot be permitted to sell the property of the mortgagor otherwise than in a mortgage suit in execution of a decree obtained for a sum covered by the mortgage which principle may be stated to be founded on the doctrine "once a mortgage always a mortgage". It is obvious that this case differs from the present in that here the suit was not brought in respect of a sum due on the mortgage and that therefore the equitable doctrine does not apply. But as the doctrine of equity has been relied on in subsequent cases in this court it is worthy of notice that even in a case where the equitable doctrine does apply, their Lordships held that the right to redeem has been lost. In our opinion, the decision of the Privy Council is in favour of the view taken by the lower appellate court. Then the learned Vakil relied on a decision of the Full Bench in *Ashutosh Sikdar* v. *Behari Lal Kirtania* 2. There seems to be some doubt as to whether the majority of the Judges came to any decision on this point at all. In a later case one of them took the view which the appellants ask us to take; but the High Court of Allahabad in considering his judgment have expressed their opinion that it is inconsistent with the view taken by him in the Full Bench case. Whether that be so or not, there is the very elaborate judgment of Mr. Justice Mookerjee in the Full Bench case where he sets out the different views which can possibly be taken on this point, and if the judgment of the Full Bench has decided this point in favour of the contention of the respondent, then Mr. Justice Mookerjee's judgment must be taken

1. (1904) I. L. R. 32 C. 296. 2. (1907) I. L. R. 35 Cal. 61.

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to support that view. The decision of the Allahabad Full Bench referred to is *Lal Bahadur Singh* v. *Abharan Singh* [1]. Their Lordships considered all the cases including the decision of the Privy Council, the decision of the Full Bench of the Calcutta High Court and the decisions of this court, and they take the view not only that the sale in contravention of S. 99 is not void, which view is acquiesced in by all the courts, but that being merely voidable, if it is not avoided by proceedings in execution prior to the confirmation of the sale, the right of the mortgagor and those who represent him to redeem is absolutely extinguished, whether the purchaser at the sale be an outsider or the mortgagee bidding by leave of the court. There is no question that this decision is strongly in favour of the respondent. But our attention has been drawn to a number of decisions of this court, some of which are not very easy to reconcile, and we are asked to follow the decision in *Muthu* v. *Karuppan* [2], which the appellants rely on as supporting their contention. The first decision is that in *Muthuraman Chetty* v. *Ettappasami* [3]. Speaking for myself, I do not think that it decides this question although the view has been taken in a later case that it does. The next case is *Mayan Pathutti* v. *Pakuran* [4], and this admittedly leaves the question open. The third case is *Erusappa Mudaliar* v. *Commercial and Land Mortgage Bank, Ltd.* [5] which was dissented from in *Sesha Aiyar* v. *Krishna Aiyangar* [6] and in *Ikkotha* v. *Chakkiamma* [7]. We have examined these cases very carefully and we cannot find that they decide anything which will assist us in the decision of this case. Doubts have arisen as to whether there is any difference between the cases where the mortgagee purchases the property at the execution sale and the case where it is purchased by a stranger. We do not think, that this question arises here, but we feel some little difficulty in appreciating the foundation of the difference in that the section which we have to construe and apply, says nothing about the purchaser at the court sale but provides that the actual sale is illegal, and the equitable distinctions applicable to those different cases seem to us not matters for consideration here. We then have two decisions *Muthu* v. *Karuppan* [2] and *Dharanikota Venkayya* v. *Budharazu Surayya*

1. (1915) I. L. R. 37 All. 165.
2. (1907) I. L R 30 M. 318, 315=17 M. L. J. 163.
3. (1898) I. L. R. 22 M. 372 at 375: 9 M. L. J. 113.
4. (1898) I. L. R. 22 M. 347: 9 M. L. J. 98.
5. (1899) I. L. R. 23 M. 377: 10 M. L. J. 91.
6. (1900) I. L. R. 24 M. 96=12 M. L. J. 383.
7. (1903) I. L. R. 27 M. 428.

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Garu [1]. It is a little difficult to reconcile those two cases because it seems to us, on the examination of the facts in the cases, the judgment in both cases do not correctly represent the facts and that the ground of distinction taken in *Dharnikota Venkayya* v. *Budharazu Surayya Garu* [1] does not really arise. But the case on page 362 lays down definitely that where there has been no objection to confirmation, there is no power to redeem, and what is more important is that the learned Judges follow and rely on the decision of the Privy Council in *Khirajmal* v. *Daim* [2]. In this state of the authorities, it seems to us that we should follow the decision in *Dharnikota Venkayya* v. *Budharazu Surayya Garu* [1] strengthened as it is by the decision of the Full Bench in *Lal Bahadur Singh* v. *Abharam Singh* [3] in preference to dicta which are to be found in other cases of this Court.

The appeal, therefore, will be dismissed with costs.

Ayling, J.—I agree.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Ayling and Mr. Justice Seshagiri Aiyar.

The Mylapore Permanent Benefit Fund Ltd., in liquidation by its Liquidators Mr. A. Venkatarayaliah and another. ... *Appellants* *(*Defendants*).

v.

T. Arogiasami Pillai ... *Respondent* (*Plaintiff*).

The Mylapore Permanent Benefit Fund Ltd, v Arogiasami Pillai.

Company—Limited liability—Liquidation—Share-holder indebted to company —No right to set off paid up calls on his shares against the debt.

Under the rules of a company with limited liability a share-holder with 5 shares was entitled to a sum of Rs. 500 on payment of Rs. 5 every month for a period of 84 months. In August 1910 the share-holder borrowed Rs. 500 from the company on mortgage of the suit properties, undertaking to pay the interest on the principal sum every month. The share-holder paid the subscription on his shares as well as the interest on the mortgage money till August 1913 and sold the mortgaged properties to plaintiff in April 1914. The company went into liquidation in May 1914. In 1915, plaintiff sued for redemption of the suit properties on payment of the mortgage money less the amount paid by the share-holder towards his shares. The rules of the Fund did not provide for any such appropriation.

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* C. C. C. A. No. 13 of 1916. 21st November. 1916.

1. (1903) I. L. R. 30 M. 362. 2. (1904) I. L. R. 32 C. 296.

3. (1915) I. L. R. 37 A. 165.

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Held, that the plaintiff was bound to pay the whole of the mortgage debt and that he was not entitled to deduct therefrom the amounts paid by the shareholder towards his shares.

Grissel's Case [1], *Black and Co.'s Case* [2], *Hiram Maxim Lamp Co., In re* [3]. Referred to.

Appeal against the decree of the Madras City Civil Court in O. S. No. 77 of 1915.

M. B. Dorasami Aiyangar for Appellant.

G. Krishnaswami Aiyar for Respondent.

The Court delivered the following

Judgment:— The vendor of the plaintiff took five shares in the defendants' fund (The Mylapore Permanent Benefit Fund) in July 1910. In August following he borrowed from the fund Rs. 500 and executed a deed of mortgage in respect of the suit property in his own behalf and on behalf of his minor sons, as their guardian. Under the rules of the Fund, he had to pay Rs. 5 a month as share-holder, and was entitled to Rs. 500 at the end of 84 months. There are provisions in the rules for payment of penal interest in case the subscription was not regularly paid. Under the deed of mortgage, he and his sons were liable to pay interest at a particular rate every month. The document contains provisions for the payment of a higher rate in case interest was not regularly paid. The plaintiff's vendor paid the subscription on his shares and the interest on the mortgage till August 1913. The plaintiff purchased the equity of redemption of the property mortgaged to the Fund in April 1914. The Fund went into liquidation in May 1914.

The case for the plaintiff was that the calls paid by his vendor must be deducted from the amount of the loan originally advanced, and that he should be entitled to redeem the property on payment of the balance. The Fund contended that the paid up calls should not go in reduction of the debt due and that the entire amount of the mortgage debt should be paid before redemption. The learned City Civil Judge holding that the subscriptions paid should be given credit to the plaintiff, has decreed redemption on payment of the balance. The fund has appealed.

The learned Judge has mainly relied upon *Brownlie* v. *Russell* [4], for his conclusion. That is a case of a Building Society.

1. (1866) 1 Ch. A. 528.
2. (1872) 8 Ch. A 254.
3. (1903) 1 Ch. 70.
4. (1883) L. R. 8 A. C. 235.

The Mylapore Permanent Benefit Fund Ltd. v. Arogiasami Pillai.

Lord Selborne points out that Building Societies are different from Joint Stock Companies and Friendly Societies and that the liability of contributories in such cases is wholly regulated by the contract and by the special rules of the Society. Rule 12 which is printed at page 237 makes it clear that the loans advanced to members should be liquidated by monthly payments. That is a distinct provision that such payments ought to be applied towards the debt advanced to the member. There was a similar provision in the case of the Society referred to in the judgment of the House of Lords : *Tosh v. North British Building Society* [1].

In the present case, the rules do not provide for the appropriation of the monthly subscriptions towards the loan. On the contrary, the provision is for the settlement of the account after the calls have matured at the end of the 84th month, and for the payment of the balance. No doubt, there is nothing to prevent the redemption of the mortgage at an earlier date ; but if it was left outstanding, the adjustment of the two claims can only be made at the end of the 84th month.

Mr. G. Krishnasawmi Aiyar referred to the fact that the sons also joined in the execution of the mortgage and undertook to pay the calls. We do not think this makes any difference. We have seen from the accounts kept by the Fund that the subscription as such was paid only by the father as shareholder.

These being the facts, the law is clear. It was held in *Crissell's case* [2], that when a society goes into liquidation, the contributory or the shareholder is not entitled to set off the paid up calls or the calls that he may be required to pay as a contributory against the debt due from him. Lord Chelmsford, L. C. stated the law upon this point thus: "And the argument against the allowance of a set off, addressed to the Court on behalf of the official liquidators, is extremely strong—that if a debt due from the Company to one of its members should happen to be exactly equal to the call made upon him, he would in this way be paid twenty shillings in the pound upon his debt, while the other creditors might, perhaps, receive a small dividend, or even nothing at all.

"The case of a member of a limited company is different from that of a member of unlimited liability as to set off. This is exemplified in the 101st section, where a set off upon an

1 (1886) L. R. 11 A. C. 489. 2. (1866) L. R. 1 Ch. App. 528.

The Mylapore Permanent Benefit Fund Ltd. v. Arogiasami Pillai.

independent contract is allowed to the member of an unlimited company against a call, although the creditors have not been paid—evidently because he is liable to contribute to any amount until all the liabilities of the company are satisfied, and, therefore, it signifies nothing to creditors whether a set off is allowed or not. But with respect to a member of a company with limited liability, if a set off were allowed against a call, it would have the effect of withdrawing altogether from the creditors part of the funds applicable to the payment of their debts." As this is a Fund with limited liability, the share-holder under the ruling is not entitled to any set-off. In *Black and Co.'s case* [1] Lord Selborne, L. C. approved of the dictum of Lord Chelmsford and explained the principles on which the refusal to allow a set off is based: "I think it right, rather in consequence of what was said by the Court of Common Pleas in the case of *Brighton Arcade Company* v. *Dowling*[2] than for any other reason, to observe that I entertain no doubt whatever that *Grissel's case* was decided on the soundest principles. What is the ordinary law of set off? It is what in the Civil law was called compensation, and simply means this: that when you have got two cross demands of a nature substantially the same and due to and from A and B in the same right that is to say, when the one is a creditor in his own right and debtor also in his own right to the other, the one debt may be set off against the other at the option of the party from whom payment is demanded. But it is essential in such cases that the rights should be substantially the same. If they were apparently the same at law but different in equity, set off would not be allowed here; nor do I suppose that, in the present state of the law, it would be allowed at common law either. But here the rights are substantially different. The moment that the winding up takes place, the whole administration is carried on with a view to the payment of the debts of the creditors, and in the first instance to payment pari passu ... ... and the hand which receives the calls necessarily receives them as a statutory trustee for the equal and rateable payment of all the creditors. The result of this contention, that one particular creditor may pay himself in full by retaining his own calls and not paying them, would, in effect, be to give him a preference, and to exonerate,

1. (1872) L. R. 8 Ch. App. 254, at 261. 2. (1868) L. R. 3 C. P. 175.

The Mylapore Permanent Benefit Fund Ltd. v. Arogiasami Pillai.

him from his obligation as a shareholder to contribute towards the payment of the debts of the other creditors. That appears to me to be utterly opposed to the whole principle of the law of set off, and to all the provisions of the Act which bear on the subject." We have made these lengthy quotations as no reported Indian case on this subject has been brought to our notice, and as it is desirable that the law on the subject should be made clear. These decisions were followed in *Hiram Maxim Lamp Company In re* [1]. See also Lindley on Companies, Sixth Edn., pages 1022 and 1027 : what applies to a set off in Court is equally applicable to an attempted appropriation by the plaintiff by way of set off before he sues for redemption.

This above statement of the law governs all Joint Stock Companies and Friendly Societies. We must, therefore, hold that the plaintiff is bound to pay the entire debt secured by the mortgage before he can redeem the property. We must modify the decree of the City Civil Judge as above indicated. Time for payment will be extended by three months from this date. Each party will bear his own costs throughout. The memo. of objections is also dismissed with costs.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Kumarasami Sastri.

Krishnappa Mudali ... *Appellant* Respondent (Plaintiff.)*

v.

Periasami Mudali ... *Respondent (Petitioner 4th Defendant).*

Krishnappa Mudali v. Periasami Mudali.

Civil Procedure Code, S. 47—"Party to suit"—Exonerated party if and when "party to suit"—Redemption suit—Person claiming by title paramount made party defendant—Exoneration, on ground of misjoinder—Issues affecting him expressly left open—His property delivered in execution of decree—Petition by him under Or. 21, R. 100—Maintainability—Scope of enquiry in petition.

Exoneration of a party from a suit may be due to various causes and the question whether the party remains on record for the purpose of S. 47 of the Code in spite of such exoneration will depend upon the nature and scope of the order having regard to the pleadings and the reason which led to such exoneration. The mere fact that the name of the exonerated party is not formally removed from the records pursuant to the order exonerating him will not affect the question as to whether he remains a party.

Venkatapathy Naidu v. *Subbayya Mudaly* [2], refd. to.

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* A.A.A.O. No. 28 of 1916. 21st December, 1916.

1. (1903) 1 Ch. 70.

2. (1907) 17 M. L. J. 416.

Krishnappa Mudali v. Periasami Mudali.

Where a person, who was made a defendant in a suit for redemption but who claimed an interest in the mortgaged property adverse to the mortgagor and mortgagee, was exonerated from the suit on the ground of his being an unnecessary party and the order exonerating him expressly left open the issues affecting him, *held* that he ceased to be a party to the suit for the purpose of S. 47 of the Code, that a petition filed by him under Or. 21, R. 100 thereof objecting to the delivery in executions of the decree in the suit for possession of his property was quite competent and that the executing court ought not on such a petition to go into the question of the title of the petitioner but must confine itself to the main question of possession and dispossession.

Appeal against the order of the District Court of South Arcot in A. S. No, 74 of 1915 preferred against the order of the Court of the District Munsif of Tindivanam in E. P. I. E. A. I., and M. P. R. No. 15 of 1915 in O. S. No. 481 of 1914.

T. Ethiraja Mudaliar for Appellant.

V. Visvanatha Sastri for Respondent.

The Court delivered the following

Judgment:—The appellant who claimed title as purchaser of certain items of property sued to redeem a mortgage executed by the 6th defendant in favour of the 1st defendant. The 4th defendant who is the present respondent was made a party to the suit on the ground that he was claiming an interest in the property. As he claimed an interest adverse to the mortgagor and mortgagee he was exonerated from the suit. The order recites that the 4th defendant was an unnecessary party to the suit and that he was exonerated with costs " leaving open the issues affecting him". A decree for redemption was passed in favour of the plaintiff appellant and he paid the amount decreed and prayed that possession of the mortgaged property be delivered to him. The amin in execution delivered a portion of the property in the possession of the respondent. The respondent who had been exonerated from the suit and whose claims to the properties were not adjudicated upon filed a petition under Order XXI, Rule 101 of the Code of Civil Procedure objecting to possession being given on the ground that the property belonged to him and was in his possession and enjoyment and that the decree in the suit was collusively obtained by the plaintiff against the 6th defendant who had no title. The decree holder opposed the application and contended *inter alia* that as the 4th defendant was a party to the suit his remedy was under S. 47 of the Code and not under Order XXI rule 101. The District Munsif was of opinion that S. 47 did not apply and that he came under Order XXI, rule 100. He ordered the 4th defendant to be restored to possession,

Krishnappa Mudali v. Periasami Mudali

On appeal the District Judge was of opinion that section 47 applied but dismissed the appeal on the ground that the provisions of S. 47 and Order XXI, Rule 100 were not mutually exclusive.

The chief grounds urged in appeal are that the 4th defendant continued to be a party to the suit notwithstanding the fact that he was exonerated, that the Lower Appellate Court should have gone into the question of the title of the 4th defendant and should have dismissed his petition if he was unable to show a title superior to that of the plaintiff instead of having confined itself to the main question of possession and dispossession.

We are of opinion that the case falls under Order XXI, Rule 100 of the Code of Civil Procedure and that the Lower Courts were right in refusing to decide in execution proceedings questions which had advisedly not been adjudicated upon in the suit.

When a party to a mortgage suit is exonerated on the ground that he sets up a title adverse to both the mortgagor and mortgagee the ground of exoneration is that he ought never to have been made a party the suit being bad for multifariousness as the plaintiff is joining causes of action which ought not to be joined and the joinder of which will be embarrassing. In *Jaggeswara Dutt* v. *Bhuban Mohun Mitra*[1] it was held that such a suit was against the provisions of Ss. 44 and 45 of the old Code of Civil Procedure (order II, rules 4 and 5 of the present code) and was bad for multifariousness and in *Mussammat Radha Kunwar* v. *Thakur Reoti Singh*[2] their Lordships of the Privy Council were of opinion that the joinder in a mortgage suit of parties who set up adverse claims was irregular and would only lead to confusion.

The exoneration in the present case having been on the ground of misjoinder we are of opinion that the party whose claim was not adjudicated upon does not remain a party to the suit for the purpose of S. 47 of the Code of Civil Procedure. Exoneration from the suit may be due to various causes and the question whether a party remains on record for the purpose of S. 47 in spite of such exoneration will depend upon the nature and scope of the order having regard to the pleadings and the reason which led to such dismissal or exoneration. To hold that in cases of misjoinder (and consequent refusal of the court to adjudicate upon the particular matters in contest) the party

1. (1906) I. L. R. 33 C. 425. 2. (1916) 31 M. L. J. 571.

Krishnappa Mudali v. Periasami Mudali.

whose claim was not adjudicated upon and who was exonerated remains a party to the suit would lead to the anomaly that the court would be bound in execution proceedings to decide the very questions which it refused to determine in the suit.

No authority has been cited for the broad proposition that a party once on the record remains a party notwithstanding exoneration so as to entitle the court to determine in execution matters which it refused to adjudicate upon in the suit. Most of the authorities cited were under section 244 of the old Code of Civil Procedure and do not throw much light on the explanation to section 47 which was added by the Code of 1908 and there is a conflict of authority so far as the Madras High Court is concerned as to the effect of exoneration. None of the cases cited deal with the case of the striking out of a claim on the ground of misjoinder: *Ramaswami Sastrulu* v. *Kameswaramma* [1], and *Sivasamba Iyer* v. *Kuppan Samban* [2], decided that a party who is exonerated and against whom a suit is dismissed comes within section 244 of the old Code of Civil Procedure and section 47 of the new Code, but they do not appear to be cases of exoneration by reason of misjoinder of causes of action. In *Ramaswami Sastrulu* v. *Kameswarammu* [1], the observation of the judges at page 367 when referring to *Gadicherla Chinna Seetayya* v. *Gadicherla Seetayya* [3] indicate that where the name of a party who has been exonerated is actually removed from the record the result would have been different. In C. R. P. No. 768 of 1915 and appeal against Order No. 88 of 1915, Oldfield and Krishnan, JJ. were of opinion that the removal of the name of a party from the suit such as appears to have taken place in *Gadicherla Chinna Seetayya* v. *Gadicherla Seetayya* [3] would take the case out of S. 47 of the Code. As pointed out in *Venkatapathi Naidu* v. *Subbayya Mudali* [4] the mere fact that the name of the exonerated party is not formally removed from the records pursuant to the order exonerating him would not affect the question as to whether he remains a party.

The appeal fails and is dismissed with costs.

A. S. V.

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1. (1900) I. L. R. 23 M 361.
2. (1915) 29 M. L. J. 629.
3. (1897) I. L. R. 21 M. 45.
4. (1917) 17 M. L. J. 416.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Abdur Rahim, The Offg. Chief Justice and Mr. Justice Seshagiri Aiyar.

K. Murugappa Chetty ... *Appellant** (*Plaintiff*).

v.

Murugappa Chetty v. Vyapuri Chetti.

P. Vyapuri Chetti and another ... *Respondents* (*Defendants*).

Limitation Act, Art. 85—Mutual, open and current accounts—Striking of a balance due on a particular date, not signed—No running account on the date of suit—Whether suit falls under Art. 85.

In the case of a mutual, open and current account the mere fact that there was a settlement in the sense of striking of the balance due on a particular date, does not disentitle the plaintiff from claiming the benefit of Art. 85 when the settlement is not signed by the defendant and does not amount to an account stated within the meaning of Art 64.

On appeal from the judgment of the Honourable Mr. Justice Bakewell, dated the 22nd October 1915 in the Ordinary Original Civil Jurisdiction of this Court in C. S. No. 400 of 1914.

Venkatasubba Row and *Radhakrishnayya* for the Appellant.

E. S. Chidambaram Pillai and *P. N. Marthandam Pillai* for the Respondents.

The Court delivered the following

Seshagiri Aiyar, J.

Judgments:—*Seshagiri Aiyar, J.*—The case is by no means free from difficulty. If the parties had been allowed to adduce all the evidence, the points arising for decision would have been more easily solved, but that has not been done.

I accept Mr. Venkata Subba Row's statement that the learned Judge heard evidence only on the question of limitation, and that the case was stopped after that. Mr. Marthandam Pillai said that he was not in a position to contradict the statement. The nature of the questions put to the solitary witness examined in the case, the state of the records and the judgment of the learned Judge support the statement made by the learned Vakil at the bar.

Now as to the facts. A firm known by the name of Salamangalam Murugappa Chetty. A. Venkataperumal Chetty & Co., carrying on business in Madras, acted as commission agents for the sale of the goods consigned by the defendants between September

* O. S. A. No. 99 of 1915. 11th October, 1916.

1909 and May 1911. The Madras firm advanced money on the goods from time to time, for which they charged interest. They were also entitled to commission. The firm became practically insolvent about the beginning of 1911. By Exhibit A, the plaintiff in this case and four others were appointed trustees to collect the outstandings of the firm and to make a distribution in favour of the creditors. One Thayaramma sued the trustees for dissolution of partnership and other reliefs: C.S. No. 292 of 1911. A Receiver was appointed in the course of the suit to manage the affairs of the firm. The Receiver put up the outstandings due to the firm to auction, and the present plaintiff with the permission of the Court became the purchaser.

The sale was on the 9th of November 1912, and the conveyance by the Receiver was on the 2nd of January 1913. I have thus far traced the title of the plaintiff.

Before the firm made over its assets to trustees, there was an attempt at a settlement of accounts between the firm and the defendants. What actually happened has not been fully elicited. As a result of the negotiations, a promissory note was executed on the 12th of September 1911 (Exhibit D). It purports to proceed from both the defendants but is signed only by the 1st defendant. The firm sued the 1st defendant alone on the note in C. S, No. 12 of 1912, I shall have to refer to it more in detail later on. As a result of this statement, the firm withdrew the suit with liberty to sue again. This was on the 26th of November 1912 (Exhibit II). The present suit is against both the defendants on the original cause of action, ignoring the promissory note.

The 1st defendant's case is that the settlement evidenced by the promissory note bars the suit. The written statement spells as if he pleaded payment. However, I accept the interpretation suggested that it only refers to the adjustment and not to any payment. He also pleads the bar of limitation. The 2nd defendant says that nothing is due, that the 1st defendant is not his partner and that the claim is barred by limitation.

Issues relating to the competency of the plaintiff to maintain the suit, to the partnership between the defendants, to limitation and to the settlement of the amount due were raised.

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The learned Judge's view apparently was that the original cause of action was not open to the plaintiff, because of the promissory note, and that as the suit on the note would be barred, the plaintiff can have no remedy in this suit.

In this Court, in addition to arguments advanced to support the conclusions of the learned Judge, contentions were put forward on all the issues raised in the case with a view to support the Judgment.

I regret my inability to accept the view of the learned Judge. Considerable reliance was placed upon a note made by the learned Judge in the course of the hearing. The note is "Plaintiff's vakil admits the settlement mentioned in the 5th issue". The learned Vakil who conducted the case has stated explicitly before us that the admission related to the willingness of the firm to give up Rs. 4,000 and to take a promissory note for Rs. 2,500 in full satisfaction of all claims, and not to the validity or to the binding character of the settlement. This statement was not contradicted by the learned vakil for the Respondent. If the statement was construed as admitting that the original debt was extinguished by the promissory note, there was no necessity to proceed any further. As a matter of fact, even after this admission, witness was examined on the issue as to limitation. In my opinion, this statement should not be regarded as having conceded anything more than what the learned vakil says he conceded.

I shall deal first with the question of limitation. I fail to see how the 2nd defendant can plead the bar. He was not sued on the note as he did not sign it. The cause of action against him is on the original dealings. His case is that the 1st defendant is not his partner and that he is not bound by any settlement to which the 1st defendant was a party. The statement in the plaint that the defendants had dealings as a firm is put in to make them jointly and severally liable. If the 2nd defendant is not a partner and if the accounts, as alleged by him, do not show any liability, the suit must fail as against him. That is on the merits. I fail to see how it is open to him to plead the bar of limitation on the ground that there was a settlement, when his whole case is that the settlement is not binding on him.

The learned vakil for the respondent contended Article 85 of the Indian Limitation Act was inapplicable in as much as there

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was a settlement in fact, whatever may have been its legal consequences. The so-called settlement is only a striking of the balance due on that date. It is not signed by either of the defendants. It is clear that this entry in the books will not furnish a cause of action as on an account stated under Article 64 of the Limitation Act. The mere fact that the balances were struck will not close the accounts. The decision in *Lakshmayya* v. *Jagannadham* [1] proceeds on this view. The decision in *Marimuthu* v. *Swaminatha Pillai* [2] to which our attention was drawn only lays down that mutual open and current account can be settled so as to give rise for a suit for money due. The question of limitation was not decided in this case. *Aiyasami Chetty* v. *Chinniah Nainar* [3] is to the same effect. I may cite another case, *Jalim Singh* v. *Choonee Lall Johury* [4], which decides in effect, that a settlement of a mutual, open and current account need not be such as to invite Article 64 of the Limitation Act. This is clear. There can be a settlement without there being a stated account. The fact that on the date of the suit, there was no running account does not affect Article 85. See *Ganesh Lal* v. *Sheo Gulam Singh*, [5] *Laljee Sahoo* v. *Roghoonunlun Lall Sahoo* and [6] *Lakshmayya* v. *Jagannadham* [1]. It was conceded that if article 85 applied, the suit would be in time. I am, therefore of opinion that there must be a trial in this case as regards the 2nd defendant.

The case of the 1st defendant is somewhat different. He it was who settled the amount due. He signed the promissory note. When sued on the note, he pleaded that the note was ineffectual as it was not signed by the 2nd defendant, that he signed the note only on the understanding that the 2nd defendant also would join in its execution and stated distinctly, "that there was no concluded and binding contract to pay the amount of the said promissory note, and that no obligation to pay arose there under." His present plea is that the promissory note is a bar to the suit and that there is also the bar of limitation. If this defendant is entitled to these legal defences notwithstanding the manifest dishonesty of his present plea, the suit must fail as against him. But I am unable, as at present advised, to conclude that the records in this case compel us to exonerate

1. (1887) I. L. R. 10 M. 199.
2. (1897) I. L. R. 21 M 366.
3. (1916) 3 L.W. 388.
4. (1911) 15 C. W. N. 882.
5. (1879) 5 C. L. R. 211
6. (1880) I. L. R. 6 C. 447.

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him. What he may be able to establish at the trial, I need not speculate upon. His vakil stated that he having been a party to the settlement, the suit against him must be based on that contract and on nothing else. But the question has to be found whether there was a contract or whether there was simply an inchoate attempt at a settlement. Further, supposing that there was a settlement which furnished the ground of claim against him, and that Article 115 would apply to his case, as held in *Jalin Singh* v. *Choonee Lall Johurry* [1], the further question would arise as to when the breach arose. The breach may have been the failure to obtain the consent of the 2nd defendant. It may have been later on. The applicability of article 115 was not suggested or argued in the Court below and therefore no evidence was directed to it. As at present advised, I am not prepared to hold that the claim against the 1st defendant is on the face of it barred by limitation.

I ought to have noticed earlier another point pressed before us by the learned Vakil for the Respondent. His argument was that under Exhibit C., the conveyance from the Receiver, the plaintiff purchased only the right to sue on the contract which was the basis of the claim in C. S. No. 12 of 1912 and that it is not open to him to fall back upon the original cause of action. I see no force in this contention. The sale of the outstandings was on the 9th of November 1912. The suit was withdrawn on the 26th of November 1912. The conveyance was actually executed on the 2nd of January 1913. Clause 1 of the conveyance begins with the statement "All the outstandings due to the business carried on under the name and style of Salamangalam Murugappa Chetty, Apala Venkataperumal Chetty & Co., at No. 139, Anna Pillai Street, Georgetown, Madras, including the outstandings in respect of which suits were pending on the 9th November 1912". Then the clause enumerates the suits and opens with the words "including the outstandings etc.". I am unable to regard the enumeration as exhausting the preamble. Clauses (a) to (c) were apparently put in *ex majori cautela*. They were intended to enable the purchaser to prosecute the suits, if he chose, not to preclude him from relying upon the original cause of action, if he found the suit defective. In fact, the suit

1. (1911) 15. C. W. N. 882

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was withdrawn when the conveyance was executed. I am, therefore, unable to hold, that the plaintiff should not fall back on the original cause of action.

I must point out that the pleadings in this case ought to have been fuller. We often come across very prolific statements in the plaints. The present case errs the other way. The reasons for the failure of the previous litigation and why the present suit against both the defendants became necessary ought to have been stated in some detail.

On the whole I have come to the conclusion that the judgment of the learned Judge should be reversed and that the suit should be remanded for disposal on the merits. Costs to abide the result.

The Offg. Chief Justice ;—I agree.

C. A S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Coutts Trotter, and Mr. Justice Seshagiri Aiyar.

Thachangot Cheruvani Narayani Amma, and another. ... *Appellants** (*Plaintiffs*)

v.

Malammal Kootancheri Kunchukutti Amma, and others. ... *Respondents* (*Defendants Nos.* 1, 2, 12 *to* 24, 26 *and* 27).

Narayani Amma v. Kunchukutti Amma.

Malabar Compensation for Tenant's Improvements Act (I of 1900)—Object and scope of—Trees of spontaneous growth—Rights of Jenmi and Kanomdar—Provision empowering jenmi to enter in the land, cut and remove trees if valid.

The Malabar Compensation for Tenants Improvements Act does not effect a transfer of ownership in trees of spontaneous growth from the jenmi to the tenant. The Act merely regulates the right of the tenant to compensation. Under the Act, the tenant on eviction by the landlord, is entitled to compensation in respect of all spontaneously grown trees left on the holding which came into existence either during the term of his own lease or that of his predecessor, provided no compensation has already been paid for it.

A contract entered into after 1886 under which the landlord is empowered to enter on the demised land, cut and remove trees of spontaneous growth is void as being in contravention of S. 19 of the Act.

Quære: Whether the ownership in trees of spontaneous growth before Madras Act I of 1900 vested in the jenmi or the tenant.

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* S. A. No. 2371 of 1914. 22nd September, 1916.

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Second Appeal against the decree of the Court of the Temporary Subordinate Judge of Palghat in Appeal Suit No. 1057 of 1913 preferred against the decree of the Court of the District Munsiff of Ottapalam in Original Suit No. 331 of 1912.

J. L. Rosario and *K. Kuttikrishna Menon* for Appellants.

K. P. M. Menon and *T. Eroman Unni* for Respondents.

The Court delivered the following

Coutts Trotter, J.

Judgments:—*Coutts Trotter, J.*—This is an appeal by the plaintiffs from the decision of the Subordinate Judge of Palghat. The suit was brought to redeem a kanom demise, dated the 20th October 1895. The kanom demise was in renewal of prior demises dating from 1887 and 1873. So that while the actual contract of tenancy out of which the suit arises dates from 1895, the defendants or their predecessors-in-title may in some sense be said to have been tenants of the plaintiffs since 1873.

The first point raised in the appeal was as to the identity of certain lands sought to be redeemed.

[His Lordship goes into the evidence on the question and agrees with the Subordinate Judge.]

The next point taken by Mr. Rosario raises questions of interest and difficulty. The kychit of 1887 contains the following clause " Without making such a payment (*i.e.*, of the seigniorage) to you for your jenmi right and satisfying you, no trees will be cut". This seems to imply that the jenmi had rights of ownership in the trees. But it is not necessary to consider this matter, because the really material clause is the clause in the later kychit of 1895 which deals much more explicitly with the subject of trees and it is this clause which in my view decides the rights of the parties.

It is as follows: " As parambas Nos. 3 and 4 of the schedule are forest plots, all the teak, rosewood trees, etc., which are in them now, having grown there spontaneously and which are yet to grow belong to you and they can be cut and removed for your purposes." The dispute which has arisen between the parties relates to certain trees which must be taken to have grown spontaneously on the property, some during the currency of the present tenancy, *i. e.*, since 1895, others between 1873 and 1895. The tenant just before the expiration of the tenancy cut down and removed a large quantity of these trees and the landlord claims

that they all belonged to him either at common law or by virtue of the terms of the kychit. A further question arises with relation to other trees of spontaneous growth which the tenants left standing on the property and for which they have been awarded compensation under the Malabar Compensation for Tenants Improvements Acts of 1887 and 1900.

The Act of 1887 has for its broad purpose to award compensation to ejected and outgoing tenants for improvements on the demised property effected by them the future benefit of which enures to the landlord. S. 3 defines improvements and enacts that certain specified works should be presumed to be improvements until the contrary is shown. Among such "improvements" are the following: (h) the planting, protection or maintenance of fruit trees, timber trees and other useful trees and plants: (i) the protection or maintenance of such trees, the same having grown spontaneously during the tenancy. S. 6 enacts in general terms that the compensation to be awarded is the amount by which the value, or the produce of the holding or the value of that produce is increased by the improvement; and certain guides are given to enable the Court to arrive at that value. S. 7 enacts in effect that any stipulation in a contract between landlord and tenant made after the 1st January 1886 shall be void so far as it contravenes the provisions of the Act. This Act was repealed by the Consolidating Act of 1900; but it has to be remembered that it was the Act in force at the time when the kychit of 1895 was executed. The Act of 1900 is a more ambitious and elaborate enactment than its predecessor; but it can hardly be said to be an advance upon it as regards felicity of expression or clearness of drafting. S. 4 takes the place of S. 3 of the old Act; Sub-Section (h) practically exactly corresponds to (h) of old Act: but Sub-Section (i) of the old Act is gone. By S. 5 (1) every tenant shall on ejectment be entitled to compensation for improvements which have been made by him or his predecessor-in-title. By S. 6 (1) where a claim is established for compensation under S. 5, the Court is to determine the amount of compensation by the method provided in Ss. 9 to 18. For the purposes of this case, it is necessary to examine the provisions of those Sections, and I may shortly summarise them as follows:—For improvements other than those relating to trees the compensation is arrived at by a calculation based on the present value of the

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improvement together with the cost of its execution. Where the improvement consists of trees spontaneously grown during the period of the tenancy or planted by the tenant or his predecessors, the compensation is to be three-fourths of the value which the timber would fetch if cut and sold in the open market (S. 10). Where the improvement consists of trees not planted by the tenant or his predecessor or of trees spontaneously grown before the commencement of his tenancy the compensation is to be calculated on a lower basis designed to arrive at the amount due to the tenant for his labour for their protection and maintenance. Mr. Rosario's able argument is as follows. The policy of the Act of 1900 is to give to the tenant compensation on a large scale for those improvements which but for the Act he would up to the time of ejectment be entitled to treat as his own property and remove, and to give him compensation on a less generous scale for "improvements" which can only be regarded in the light of maintenance and care of the landlord's property. The Act for the first time brings within the category of improvements for which the more generous rate is awarded trees of spontaneous growth, and therefore he says must be regarded as having intended for the first time to declare such trees to be the property of the tenant, the necessary corollary being that without the Act they would be and before the Act were the property of the landlord. At the time when the Kychit of 1895 was executed, the Act of 1900 was not in force and therefore there was nothing to prevent the parties from making what agreement they pleased with regard to the treatment of the timber. Accordingly there was nothing illegal or invalid in the clause of the Kychit which provided that the teak and other trees which had grown spontaneously and were yet to grow belong to the landlord and could be cut and removed by him. In so far as the ownership of the trees is concerned there is nothing retrospective in the Act, for although S. 19 is retrospective in so far as the right of the tenant to make improvements and to claim compensation for them is concerned, it does not otherwise purport to have a retrospective effect and therefore can have no effect upon his claim for damages for trees cut down during the tenancy, though it is conceded that it will have retrospective effect on the tenants' claim for compensation for trees left on the land, at any rate from the coming into force of the Kychit of

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1895 since S. 19 is retrospective in the case of all instruments later than the 1st of January 1886. Mr. Rosario's position then as I understand it may be summarised as follows: Before the passing of the Act of 1900 all spontaneously grown trees accrued to the landlord, the owner of the soil. By the Act of 1900 the ownership in trees of spontaneous growth was transferred from the landlord to the tenant: but in so far as that transfer of ownership was effected, it only operated in the case of trees which first came into being after the passing of the Act. On this footing the landlord will be entitled to damages in respect of all spontaneous timber cut and removed by the tenant whose growth was earlier than 1900. With regard to the tenant's claim for compensation the policy of the Act is to give him generous compensation only for what is to be regarded as his own property and the Act not, as has been pointed out, being retrospective in this respect, the parties are bound by the kychit of 1895 which at the time it was made was a perfectly legal stipulation and the tenant can only recover what I may call the full compensation for trees of a growth subsequent to the passing of the Act. For those of earlier growth he will be relegated to the lower scale of compensation provided for in Ss. 11 and 13.

Mr. Rosario very candidly admitted that it was vital to this argument to follow him in his first contention that the Act effected a change of ownership in the case of trees of spontaneous growth from the landlord to the tenant. I am unable to accept that contention and do not think that the Act deals or was intended to deal with questions of ownership at all but is confined to the question of compensation. I may add that I do not think that the amount of compensation awarded by S. 10 of the Act in the case of spontaneously grown trees, namely three-fourths of their value throws any light on the question whether or no the Act intended to effect a change of ownership. I do not think it is necessary in an Act so loosely drafted as this to follow Mr. Menon's minute deductions from the language of Ss. 5 and 6 and say that the Act enacts that a tenant who passively allows trees to take root and grow on the land is "making improvements" within the meaning of the Act. I think it is sufficient to say that the Act in enumerating certain things for which the tenant should be given compensation, the great majority of which can be properly described as improvements

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made by him, includes in the list spontaneously grown trees which can hardly be properly described as "improvements" and certainly cannot be said to be made by him or anybody else. I am therefore of opinion that the Act awards compensation to the tenant in respect of all spontaneously grown timber left on the holding on ejectment which came into existence either during the term of the tenant or that of his predecessor provided that no compensation has already been paid for it. It is conceded that on this construction in the preseut case the tenant will be entitled to compensation on what I may call the larger scale in respect of all trees which came into existence in 1873 or any subsequent year.

With regard to the landlords' claim for damages for trees cut and removed by the tenant the position is this. If the trees in question were the property of the tenant he is obviously entitled to do what he likes with them. I have already held that the Act 1900 does nothing to alter the position with regard to this or vest a new ownership in the tenant. Then it is said that whatever may have been the position at common law, the provision in the kychit of 1895 clearly vests the ownership in the landlord. It therefore becomes necessary to examine that clause in the contract and see whether it is obnoxious to the provisions of S. 19. It is clear that under the Act the tenant would be entitled to claim compensation for all spontaneously grown trees which he left standing at the end of his tenancy. It follows that a contract which allows the landlord to come on the land and cut and remove such trees must necessarily limit the right of the tenant to claim compensation for such improvements. I therefore hold that the provision in the kychit that the landlord may cut and remove these trees is contrary to the Act and bad. It is argued that the early words which purport to give the property in the trees to the landlord are separable and do not contravene any provison of the Act. Treating them as separable I do not think they help the appellant, because in my opinion they do not form an operative portion of the clause but are merely declaratory of the supposed rights of the parties. Some Judges of this Court have expressed the opinion that trees of spontaneous growth become the property of the tenant at common law apart from any question of the

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effect of the statute. See *Krishnacharya* v. *Anthaki* [1]. I do not however clearly follow the reasoning by which this conclusion is attained and should be inclined myself to the view that that which came to grow on the land naturally became the property of the ultimate owner of that land ; but I do not think it is necessary to decide that question for the purposes of this case. During the tenancy the tenant is entitled to cut down trees in the ordinary course of prudent forestry though they may belong to the landlord. His only obligation is to return the property in substantially the same condition as he took it and to abstain from any act of the nature of waste. No allegation is made in this case that there has been any substantial diminution in the value of the property during the term by reason of the cutting of these trees, nor is there any allegation of any act in the nature of waste. In these circumstances I think the landlord's claim for damages fails.

The last point taken in appeal relates to the price which the learned Subordinate Judge has fixed for the paddy. The Fort St. George Gazette of the 11th March 1913 fixes 21·23 as the number of Imperial seers per rupee and proceeds to set out the equivalent for that in the Walluvanad Taluk as 17·40 Macleod's seers. The learned Judge apparently holds that Macleod's seers in the notification is a mistake for edangalies for the reason that the local measures in use in the taluk are not Macleod's seers but edangalies or narayams. This appears to me to be quite arbitrary and unwarrantable, and the Judge's finding in this respect must be reversed and the case sent back for a fresh finding on this issue. Six weeks for finding and seven days for objections.

We are also asked to direct an equiry to be held as to which of the trees were anterior to 1873 and which were subsequent to that date. We asked Mr. Rosario at the last hearing and he said that all that he could suggest was there might be two trees which went back to that date. I am extremely doubtful if even these could be identified with certainty and even if they could be we think the expenses of having a finding on the point will be far in excess of any possible advantage that might result to either party from it. We do not therefore think it necessary to call for a finding on this point.

1. (1915) 29 M. L. J. 314.

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Seshagiri Aiyar, J:—I agree,

On the question of the identity of the properties mortgaged I agree with my learned brother that the conclusion of the Subordinate Judge is right.

[His Lordship then considers the evidence on the point.]

The main contention is, that trees of spontaneous growth which came into existence before Madras Act 1 of 1900 was passed are the property of the jenmi, and that the declaration of the defendant in Exhibit A admitting the right of the jenmi is binding on him. The first mortgage was granted by the predecessor in title of the plaintiff to the defendant in 1873. It was renewed in 1887 by Exhibit VII and finally by Exhibt A in 1895. On the question of the right of the trees no judicial pronouncements have been quoted to us on either side. Mr. Rosario relied upon certain observations in *Narayana* v. *Narayana* [1] as indicating that the trees under the customary law of Malabar belong to the landlord. I do not think that this suggestion is borne out by the judgment. What the learned Judges say is that they were not aware of any law which recognised in the Kanomdar the right to compensation on account of trees of spontaneous growth. As I understand the judgment, it only lays down that prior to the passing of the Act of 1887 and the Act of 1900 it was not competent to the tenant to compel the landlord to purchase him out with reference to trees of spontaneous growth. The contention of Mr. Menon on the other hand that the trees belong to the tenant is not sustained by the authorities quoted by him. No doubt in *Krishnacharya* v. *Anthaki* [2] a case from South Canara, the learned Judges inclined to the view that trees of spontaneous growth belong to the tenant in possession; but they say "the appellant" (the landlord) "has not adduced any evidence of custom or usage by which he is entitled to such spontaneous growths." I do not think that that decision is clear authority for the position that tenants are owners of trees of this description in Malabar. On the other hand, the the decision in *Vasudevan Nambudripad* v. *Valiachathu Achan* [3] which seems to concede that the landlord can restrain the tenant from removing certain trees during the continuance of the tenancy, may by implication be said to lay down that the landlord

1. (1884) I. L. R. 8 M. 284. 2. (1915) 29 M. L. J. 314.
3. (1898) I. L. R. 24 M 47.

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is the owner of the trees. I do not consider that *Vasudevan Nambudripad* v. *Valiachathu Achan* [1] decides the right of the landlord any more than I consider that *Krishnacharya* v. *Anthaki* [2] gives the right to the tenant. In the first edition of his work, Mr. Wigram who had considerable experience of Malabar says that "it is the practice of the Courts to hold that in a Kuzhikkanam or ordinary kanom or any superior tenure there is an implied covenant to compensate for all *unexhausted* improvements." This would seem to imply that it was open to the tenant to have exhausted the improvements during the continuance of the tenancy. In this state of the authorities I feel great difficulty in giving a decision regarding the respective rights as to the ownership of the landlord and the tenant in trees of spontaneous growth. In this case it does not seem necessary to give a definite opinion on the question as I think that the second appeal can be disposed of upon other grounds.

I do not think that the two Acts, Act 1 of 1887 and Act 1 of 1900 should be construed as in any way declaring or defining the rights of the landlord and the tenant to trees of spontaneous growth. They were intended to fix the amount payable to the outgoing tenant or mortgagee as the case may be, in respect of improvements existing at the time of the eviction or redemption. The principle adopted in the Acts is to compensate the tenant for the labour expended by him on the land, irrespective of the question whether he had acquired a proprietary right to the trees or not. This is rendered clear by a reference to S. 3 clauses (*h*) and (*i*) of the Act of 1887. Clause (*h*) refers to the trees which have been planted, and includes in the amount of compensation to be awarded the cost of planting them. Clause (*i*) which deals with trees of spontaneous growth restrict the right of compensation to the cost of protection or maintenance. From these two clauses the conclusion is irresistible that in the case of trees planted by the tenant as well as in the case of trees of which he is only the care-taker, the compensation has reference not to the proprietorship in them but to the labour spent by the tenant in either rearing or protecting them. The Act of 1900 by S. 13 carries out this principle a step further by fixing a different scale of fees in respect of trees which have grown spontaneously, from the scale applicable to trees planted by the tenant himself.

1. (1898) I. L. R. 24 Mad 47. 2. (1915) 29 M. L. J. 314.

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Therefore in applying the two Acts it is not necessary to decide the question whether the trees belong to the landlord or the tenant. It is well settled that in awarding the compensation we have to be guided by the Act which is in force at the time of the decree. See *Kozhikot Srimana Vikraman* v. *Modathil Ananta Pattar* [1]. Therefore the only question that need be considered in this second appeal is the quantum of compensation payable and not the proprietorship in the trees. Mr. Rosario raised the point that, as the contract of mortgage on which the suit is brought was entered into in 1895, the tenant is only entitled to compensation as regards trees which were either planted by him after the contract or which came into existence after 1895. Prior to the passing of the two Acts there was some little doubt as to whether a tenant who obtains a kanom can claim to stand in the shoes of those whom he had succeeded. Mr. Holloway was of opinion that "reason, convenience and the principle of the law all point to the date of renewal as that from which improvements to be paid for are determined or calculated." This dictum apparently did not find favour with the learned Judges of this Court in *Mupanagari Narayanan Nair* v. *Virupatchan Nambudiripad* [2]. They point out that no invariable rule can be deduced on this point, but that the question must be decided on the evidence as to custom adduced in each case. When the Act of 1900 was passed, Section 5 provided that every tenant shall be entitled to compensation for improvements which have been made by him, his predecessor in interest or by any person not in occupation at the time of the ejectment who derived title from either of them. It follows from this that a tenant who has obtained a renewal is entitled to claim compensation for improvements made during his first tenancy; for if a tenant is entitled to compensation for improvements made by his predecessor, *a fortiori* he is entitled to compensation for improvements made by himself during his first tenancy. Therefore in my opinion the defendant is entitled to compensation for all improvements which came into existence since the commencement of his first tenancy in 1873. See also *Thekkemanegath Raman* alias *Kochu Poduval* v. *Kakkasseri Pazhiyot Manakkal Karnavan* [3] Per Sadasiva Aiyar, J.

1. (1910) I. L. R. 34 M. 61. 2. (1881) I. L. R. 4 Mad 287.
3. (1915) 28 M. L. J. 184.

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The further contention raised by the learned Vakil is that the clause in Exhibit A which says that the trees which have grown spontaneously and which are yet to grow "belong to you and they can be cut and removed for your purposes," does not offend against the provisions of either Act 1 of 1887 or of Act 1 of 1900 and that it is binding on the defendant. The argument is that this clause does not either take away or limit the right of the tenant to make improvements; it was conceded that if the clause operated in that direction it cannot be binding upon the defendant. I am unable to agree that the effect of this clause is not to restrict the tenant in his right to make improvements. The clause implies that the landlord can enter upon the land and cut and carry away the trees. It would impede the operations of the tenant in making improvements if the landlord is permitted to enter on the land, whenever he chooses to cut and carry away the trees. Further, it undoubtedly debars the tenant from claiming compensation, because if the landlord cuts and carries away the trees, nothing will be left outstanding at the time of eviction, and the tenant would be disentitled to compensation if they are not there. I therefore think that the clause in Exhibit A is opposed to section 19 of the Act of 1900 and S. 7 of the Act of 1887.

One other contention of the learned vakil may be dealt with in this connection before dealing with the value of paddy. Mr. Rosario contended that he ought to be given damages for the trees of spontaneous growth which the tenant had unlawfully cut and carried away during the tenancy. This proposition implies that the landlord was the owner of the trees. With reference to this contention, it may become necessary to decide the question whether the landlord or the tenant is the proprietor of the trees, if the clause which declares the right of the landlord to the trees is not opposed to S. 7 of Act 1 of 1887 and S. 19 of Act 1 of 1900. I have already stated that the condition as to cutting and carrying away the trees is obnoxious to both the sections. It is impossible to separate the clause as to ownership from the clause which entitles the landlord to enter upon the premises to cut and carry away the trees. The contract as to an essential portion being unenforceable, it is void in its entirety. See S. 24 of the Contract Act. As the right to damages was rested upon this admission of the landlord's right by the tenant in the contract of

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1895, and as I hold that this contract is not binding on the defendant it is unnecessary here again to consider the broader question raised by Mr. Rosario regarding the ownership in the trees.

On the third question raised by Mr. Rosario as to the value of the paddy it seems to me that the Subordinate Judge's judgment is unsatisfactory. There are a number of surmises in paragraph 20 for which we have not been referred to any evidence in the case. The Commissioner has given a valuation which the Subordinate Judge says he is unable to accept. In that case he was bound to have looked into the evidence and to have arrived at a finding on it instead of indulging in speculations as to whether the Government notification rightly fixes the proportion between the Imperial Seer and the Macleod's Seer. The Subordinate Judge's conclusion upon this point cannot be sustained and he must be asked to return a fresh finding regarding the price of paddy.

[In compliance with the order contained in the above judgment, the Temporary Subordinate Judge of Palghat submitted a finding as to the rate at which the price of paddy should be calculated. On the evidence he held that the price should be calculated at the rate of 17½ edangalis per rupee.]

This Second Appeal coming on for final hearing after the return of the finding of the Lower Appellate Court upon the issue referred by this Court for trial

The Court delivered the following

Judgment:—We accept the finding. The Second Appeal is dismissed with costs. Time for redemption will be 4 months from this date.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Seshagiri Aiyar.

Saravana Pillai ... *Petitioner (Petitioner-decree-holder in O. S. No. 289 of 1915.)*

v.

Arunachellam Chettiar, minor by his next friend Venkatachellam Chettiar through his agent Subramania Chettiar. ... *Respondent (Respondent decree-holder in O. S. No. 158 of 1915.)*

Saravana Pillai v. Arunachellam Chettiar.

Civil Procedure Code, Ss. 73, 115—Rateable distribution—Application for rateable distribution—Whether Court can enquire into the validity of the decree—Nature of the function exercised by the Court in ordering rateable distribution—Interference by the High Court under S. 115, Civil Procedure Code.

Under S. 73 of the Civil Procedure Code, it is not competent to a Judge to inquire into the validity of a decree on the strength of which rateable distribution is claimed.

The officer distributing the assets under S. 73 of the Code is only acting ministerially and is not acting in the performance of judicial functions.

In the case, their Lordships interfered under S. 115 of the Civil Procedure Code against an order of the District Munsiff enquiring into the *bona fides*, of the decree obtained by the petitioner in an application by him for rateable distribution.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif of Shiyali dated 29th day of January 1916, dismissing Execution Application No. 1460 of 1915 in Execution-Petition No. 285 of 1915 praying for rateable distribution of the sale proceeds in O. S. No. 158 of 1915.

The facts of the case are as follows :

One Arunachellam Chettiar obtained a decree against two persons in the District Munsiff's Court at Shiyali and proceeded to execute a decree by attachment and sale of the immoveable properties belonging to the 2nd defendant in that suit. Before the realisation of the assets, one Saravana Pillai, another decree-holder against the 2nd defendant put in an application under S. 79 for rateable distribution. Arunachella objected that Saravana Pillai's decree was a sham decree obtained by collusion between the judgment-debtor and Saravana for the purpose of defrauding *bona fide* creditors. At the time when the enquiry was begun a

* C. R. P. 664 of 1916. 15th November 1916.

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preliminary objection was taken that it was not competent for an executing court to enquire into the *bona fides* of the decree on the strength of which rateable distribution was asked for. The Munsiff after the discussion of authorities over-ruled the preliminary objection and adjourned the case for evidence on the question of *bona fides*. Against that order a revision was preferred to the High Court. Spencer, J. before whom the revision petition came on for disposal directed that in view of the conflict of authorities on the question that the case may be posted before a Bench.

R. Gopalasamy Aiyangar for the petitioner.

The lower court has taken an erroneous view on the question of jurisdiction. It is incompetent for an executing court, to question the validity of a decree sought to be executed, *Sukinakatun Rowthan* v. *Hajee Badsha Sahib*, (38 Mad. 221). Their Lordships stopped the petitioner and called upon.

K. V. Sesha Aiyangar (*amicus curiae*) for the counter-petitioner.

The lower Court has not committed any error and even assuming that it has, the error is only one of law and not of jurisdiction. Thirdly, the Privy Council has observed the order of the executing court in an enquiry under Ss. 73 is a species of administrative order, *Shanker Sarup* v. *Moje Mal*[1]. As such, it is not subject to the revisional jurisdiction of this court under S. 115 C. P. C. *Annie Beasant* v. *King-Emperor* [2]. The rule that precludes an executing court from entering into a consideration of the *bona-fides* of the decree is one founded on estoppel and not on jurisdiction. It applies only to parties to the suit and their privies. The prohibition against collateral impeachment of decrees does not apply to strangers; third parties can always question the *bona fides* or the validity of a decree. And they can do so whenever it is sought to be used against them in any suit or proceeding. (See Bigelow on Estoppel, p. 236-240. Black on Judgments, Vol. 1, p. 390-446, *Bangon* v. *Becher* [4] *Ahmedbhoy Hubibhoy* v. *Vulleebhoy Cassumbhoy* [3] *Duchess of Kingston's case.* Smith's Leading Cases, vol. II, p. 760-762, *Queen Empress* v. *Motha* [5] and *Brown* v. *Ferguson* [6].

1. (1901) I. L. R 23 A. 313.
2. (1916) 32 M. L. J. 151.
3. (1835) 3 Cl. & F. 479 at 510.
4. (1882) I. L. R. 6 Bom. 572.
5. (1897) I.L.R. 20 Mad. 339.=7M. L. J. 311.
6. (1893) I. L. R. 16 Mad. 499.

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The courts in India have uniformly held the view that it is competent for a decree-holder to attack a rival decree as sham and collusive when rateable distribution is asked for on the basis of that decree. Such a power in the court is necessary if *bona-fide* creditors are not to be despoiled of their legitimate rights. If the executing court could not adjudicate upon the collusive and fraudulent character of the decree nothing would be easier for a cunning judgment-debtor than to obtain a number of sham decrees and put them into Court and take away most of the assets realised. *In re Sunder Doss* [1], *Chhagan Lal* v. *Fazarali* [2], *Puran Chand* v. *Surendra Narain* [3], *Mathuranath Sarkar* v. *Umesh Chandra Sarkar* [4], *Peary Lal Das* v. *Peary Lal Dass* [5].

[*Seshagiri Aiyar, J.*—If as the Privy Council observe in *Shankar Sarup* v. *Mejo Mal* [6] the order directing rateable distribution is a ministerial order it would be clearly incompetent for the court to question in any way the validity of the decree.]

Moreover if those remarks were to be given full effect to the order in question would not be subject to your Lordship's revisional jurisdiction under S. 115 or under the Charter Act and the revision does not lie also. It has been held that the executing court can enquire into the question whether a decree sought to be executed is barred by limitation or not. If the executing Court under S. 73 were altogether deprived of these powers it will have to give effect to all decrees even though they may be barred by limitation.

This court has in several cases adopted the view that orders under Sec. 73 are appealable when the judgment debtor is a party and this view is consistent only with the principle that the orders are judicial and not ministerial. The result of holding that it is ministerial would be to take away this court's jurisdiction to question it in revision.

R. Gopalasawmy Aiyangar in reply.

The ministerial nature of the order under Sec. 73 is clearly brought out from a comparison of Sec. 73 with Order 21 rules 58 and 63 and rules 97-103. In the latter cases an investigation is specially provided for and an adjudication contemplated. No such provision occurs in Sec. 23.

1. (1884) I. L. R. 11 C. 42.
2. (1888) I. L. R. 13 B. 154.
3. (1912) 16 C. L. J. 582.
4. (1897) 1 C. W. N. 683.
5. (1913) 19 C. W. N. 903
6. (1901) I.L.R. 23 A. 313.

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The Court delivered the following

Judgment:—The petitioner in this case applied for rateable distribution along with others to the District Munsif. Objection was taken that the decree of the petitioner was a collusive one and that consequently he should not be allowed to share in the distribution of the assets. The District Munsif held that it was open to him to enquire into the *bona fides* of the decree obtained by the petitioner. The question for consideration is whether the District Munsif's view is right.

As the counter-petitioner was unrepresented, we requested Mr. K. V. Sesha Aiyangar to assist us in this case. We are indebted to him for the care and energy he has displayed in arguing the case on behalf of the counter-petitioner.

We do not propose to consider the question whether under no circumstances can an executing court enquire into the validity of a decree. It is fairly well settled that a judgment-debtor is not entitled in execution to impeach the soundness of a decree obtained against him. *Sudindra* v. *Budan* [1] and *Mahomed Isbu* v. *Basholappa* [2]. This principle applies only as between parties to the decree. As regards strangers, it seems clear that collaterally they can attack the validity of a decree to which they were not parties. The judgment of Lord Brougham in *Earl of Bandon* v. *Becher*[3] established that proposition. See also Bigelow on Estoppel, 5th Edn. pp. 203 and 211. The larger proposition, however, that an executing court is disentitled from questioning the correctness of a decree does not directly arise in this case. In our opinion, whatever may be the rights of an executing court in this respect, a court charged with the distribution of assets under S. 73 of the code of Civil Procedure has no such power. It was held by the Judicial Committee in *Shankur Sarup* v. *Mejo Mal* [4] that such a court is acting ministerially in apportioning the monies realised in execution. The question before their lordships related to limitation. It was argued that a suit brought to contest the validity of payments made to one of the decree holders should have been instituted within a year of the decision under article 13 of the Limitation Act. Their Lordships pointed out that in making a reteable distribution under section 295 of the Code of

1. (1885) I. L. R. 9 M 80.
2. (1903) I. L. R. 27 B 302.
3. (1835) 3 Cl. and F 479 at 510.
4. (1901) I. L.R. 23 A. 313.

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Civil Procedure, 1882, the officer was acting departmentally and not as a court and that consequently the decision of such an officer was not one which should have been set aside within a year. A comparison of the provisions of the Code of Civil Procedure relating to rateable distribution and to claim proceedings fully bears out this view. Order XXI, which relates to execution, makes provision in Rules 58 to 63 for investigating the claims of third parties. There are similar provisions beginning with Rule 97 where there is resistance to delivery of possession to the decree-holder. An enquiry is provided for in these rules, and the unsuccessful party is directed to establish his right in a court of law, failing which it is declared that the orders passed under the rules shall be final. No such provision is to be found with reference to S. 73. Clause 2 of that section says that a wrongful distribution may be questioned in a regular suit. No procedure is prescribed for ascertaining the legality or otherwise of the decrees under which rateable distribution is sought. The absence of such a provision indicates that the enquiry under section 73 is non-judicial. It follows from this that an officer distributing the assets can have no power to enquire into the *bona fides* or otherwise of a decree brought to his notice. S. 73 (c), Clause 4, does not contemplate any such enquiry. The only conditions to be satisfied are there must have been an application before the assets are realised and the decree should not have been satisfied. Both these are matters of record which do not necessitate any lengthened investigation. We are therefore on the construction of the provisions relating to rateable distribution, of opinion that it is not competent to the District Munsif to enquire into the validity of a decree on the strength of which rateable distribution is claimed.

Before we examine the decisions which have been quoted before us, we may point out that S. 73 of the Code of Civil Procedure, 1908, is only an enabling section. It does not say that the orders passed under it are final unless set aside by a regular suit. It is clear that failure to participate does not prevent a decree holder from executing his decree against the person and other properties of the judgment debtor; *Syed Nadur Hossein* v. *Baboo Pearoo Thovildarinee* [1] (Civil) and *Janoky Bullubh Sen* v. *Johiruddin Mahomed Abu Ali Coher Chowdhry* [2].

1. (1871) 19 W. R. 255. 2. (1884) I. L. R. 10 C. 567.

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Now as regards the cases directly bearing on the question there is no doubt that in Calcutta there are a number of decisions which hold that the *bona fides* of a decree can be enquired into under S. 295 of the Code of Civil Procedure of 1882, corresponding to S. 73 of the present Code of Civil Procedure. *In re Sunder Doss* [1] enunciates that principle. That was followed in *Chagan Lal* v. *Fazarali* [2]. In *Puran Chand* v. *Surendra Narain* [3] Mr. Justice Mookerjee says that the question is not free from difficulty, but, that having regard to the previous decisions of the Calcutta High Court, he was not prepared to dissent from the view that under S. 295 of the old Code the *bona fides* of a decree can be enquired into. In *Raghu Nath Gujrati* v. *Rai Chatrapat Singh* [4] Maclean, C. J. doubts the correctness of *In re Sunder Doss* [1]. In *Peary Lal Das* v. *Peary Lal Down* [5] Justice Mookerjee follows his previous decision in *Puran Chand* v. *Surendra Narain* [3]. The learned Judge in the earlier case already referred to says that as in re-enacting S. 73 of the present Code of Civil Procedure, the legislature, with knowledge of the decisions in *In re Sunder Das* [1] and *Chagan Lal* v. *Fazarali* [6], has not made any departure from S. 295 of the Code of 1882, it may be taken that it accepted as correct the view taken in these cases. But it has to be remembered that *Shankar Sarup* v. *Mejo Mal* [7] was also under the old Code, and that notwithstanding the pronouncements of the Judicial Committee that the officer distributing the assets is only acting ministerially, the legislature has not thought fit to declare that he was performing judicial functions.

We are not prepared to attach any significance to the fact that S. 73 of the present Code is almost identical in language with S. 295 of the old Code. On the whole, limiting our observations solely to the functions of an officer exercising his duties under S. 73, we are of opinion that it is not open to him to enquire into the legality or validity of a decree brought to his notice in distributing the assets.

The order of the District Munsif must be set aside: and the petition restored to file, and disposed of according to law. Costs to abide.

C. A. S.

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1. (1884) I. L. R. 11. C. 42.
2. (1888) I. L. R. 13 B. 154.
3. (1912) 16. C. L. J. 582.
4. (1897) 1. C. W. N. 633.
5. (1913) 19 C. W. N. 903.
6. (1888) I. L. R. 13 B. 154.
7. (1901) I. L. R. 23 A. 313.

PRIVY COUNCIL.

Present:—Viscount Haldane, Lord Shaw, Lord Parmoor, Sir John Edge and Mr. Ameer Ali.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Maharaja Manindra Chandra Nandi ... *Appellant.* *

v.

Raja Sri Sri Durga Prashad Singh ... *Respondent.*

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Maharajah Manindra Chandra Nandi *v.* Durga Prashad Singh.

Deed—Construction—Evidence of intention of parties not admissible—Privy Council—Practice—Fresh Point.

In construing the terms of a deed evidence of the intention of the parties thereto is inadmissible: the question is not what the parties may have intended, but what is the meaning of the words which they used.

On appeal to the Judicial Committee, in the absence of any exceptional conditions, it is not open to a party to raise a fresh point, which though raised in the pleadings and in the reasons attached to his case lodged in the Privy Council, was not raised at the hearing either in the original Court or in the first appeal.

Durga Prasad Singh v. *Gosta Behari Nandi*[1] affirmed.

Appeal from a judgment and decree of the High Court at Calcutta (August 22, 1912) substantially varying a judgment and decree of the Court of the Subordinate Judge of Manbhum (September 8, 1909).

The suit giving rise to the appeal was brought by the respondent against the appellant and another for the recovery of royalties at an enhanced rate under a kabuliyat, dated the 20th October 1908, the material portion of which is set out in the judgment of their Lordships. The plaintiff alleged that mouzah Ekra was part of his zamindari of Jherria; that his predecessor had granted the under-ground and coal mining rights to the appellant's benamidar; that at the date of the lease the only communication with the District of Jherria was by the East India Railway Co.'s line, but that a new route to Calcutta was then in contemplation to be constructed by the Bengal Nagpur Railway Company; that the parties entered into the said agreement for enhanced rate because of their impression that when the new route by the Bengal-Nagpur Railway was open the freight for coal to Calcutta would be reduced and consequently the appellant's profits would be increased; that on August 3, 1902 the freight was reduced by

* January 29 and 30, 1917.

1. (1912) 17 Cal. L. J. 58.

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more than 2 annas per ton, and consequently he was entitled to the enhanced rate of royalty under the terms of the kabuliyat.

The appellant denied that the respondent was entitled to any royalty at an enhanced rate under the terms of the kabuliyat, and contended *inter alia* that the clause as to enhanced rate could not and did not apply to despatches except those by the Bengal-Nagpur Railway at rates lower than those charged on the East Indian Railway, or to cases of delivery at any part or station other than Calcutta. He further pleaded that at the time of the execution of the kabuliyat the freight for the carriage of coal to Calcutta by the East India Railway was Rs. 3-11-0 per ton at the Railway's risk, but the new rate on both railways was Rs. 3-2-0 at owner's risk, and the rate at the risk of the railway companies was even higher than Rs. 3-11-0. He alleged that practically the whole of the coal was despatched to Calcutta by the East India Railway Company.

It appeared that at the time of execution of the kabuliyat the freight for the carriage of coal to Calcutta by the East Indian Railway was Rs. 3-11-0 per ton, which was reduced in August 1902 to Rs. 3-2-0. In February 1903 the Bengal-Nagpur Railway was extended to Jherria. The new line made still further reductions in the rates, but the authorities of both lines soon came to a settlement and fixed Rs. 3-2-0 per ton as the freight for the carriage of coal to Calcutta on their respective lines.

The Subordinate Judge settled several issues and recorded oral and documentary evidence to show the intention of the parties to the kabuliyat. He held that by the clause in question the appellant was not under liability to pay enhanced royalty in respect of coal carried by the East Indian Railway, even if its rates of freight were reduced; and that the said clause only related to coal despatched by the Bengal-Nagpur Railway and only came into force if the rate of freight on that Railway was less than that of the East Indian Railway. On appeal to the High Court this decision was reversed. Mukerji and Beachcroft, JJ., held that in construing the clause in question the Subordinate Judge was wrong in relying upon evidence of the intention of the parties, that the clause applied generally to any reduction of freight, whether of the East India Railway, or the Bengal-Nagpur Railway, or both; and that as the freight was admittedly reduced by more than 2 annas the respondent's claim must be

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decreed. For a report of the judgment *see Durga Prasad Singh* v. *Gosta Behari Nandi.* [1]

De Gruyther, K. C., and *Dunne,* for the appellant: –The true construction of the clause is that for all coal despatched by the East Indian Railway royalty would be paid at the fixed rate of 3 annas per ton, irrespective of any alteration in the freight charges. The provision as to an exhanced rate of royalty only applied to coal which might be despatched by the Bengal-Nagpur Railway then in contemplation, when completed, at a lower rate of freight than that charged by the East Indian Railway. It was only in this double event, (1) that the Bengal-Nagpur Railway was used, (2) that they charged less (Kom-less, not reduced) than the East Indian Railway that the lessor was to benefit. The whole of the coal is in fact despatched by the East Indian Railway, and the respondent is not therefore, entitled to any enhanced rate of royalty.

Secondly, there has been no reduced rate of freight within the meaning of the clause, inasmuch as the present rate of Rs. 3-2-0 is based upon a special risk note signed by the consigner providing that the coal is carried at the owner's risk only, whereas the former rate of Rs. 3-11-0 was at the railway's risk, the rate at railway's risk is still higher than Rs. 3-11-0. The contingency upon which an enhanced rate becomes payable under the kabuliyat has not as yet arisen.

(*Upjohn, K. C.* objected that this was a new point which could not now be raised.)

It was raised in the written statement and both parties have given evidence bearing on it. The Subordinate Judge disallowed the respondent's claim on other grounds, and consequently it was not necessary for him to decide it. The appeal to the High Court was by the present appellant and though the present appellant filed a memorandum of cross-objections, he was not bound to raise the point therein as being then respondent, he could argue the point without having raised it by way of a cross-objection: see Code of Civil Procedure, 1908, (Act 5 of 1908) O. 41, r. 22. (Reference was also made to the Indian Railways Act, 1890 (Act 9 of 1890), S. 72.)

Upjohn, K. C., Sir W. Garth, J. M. Parikh and *J. K. Roy,* for the Respondent, were not called on.

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1 (1912) 17 C. L. J. 53.

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Lord Parmoor.

The judgment of their Lordships was delivered (March 8, 1917) by

Lord Parmoor:—The only question raised in this appeal is whether, under the terms of a *Kabuliyat*, the respondent is entitled to an enhanced rate of royalty from the appellant. The respondent is the Raja of Jherria, and the village of Ekra is a portion of his estate. His predecessor in title, on the 20th October, 1898, granted the underground and coal-mining rights in the village of Ekra to the appellant. At that date the only railway communication with the district was afforded by the line of the East Indian Railway Company, but a new route to Calcutta, to be constructed by the Bengal-Nagpur-Railway Company, was under consideration.

The first clause of the said *Kabuliyat*, which fixed the royalty to be paid, was translated by the Subordinate Judge as follows:—

"The royalty payable would be 3 annas per ton of steam coal, steam rubble, hard and soft coke and 1 anna 6 pies per ton of brick burning rubble and dust, raised and despatched or sold by me: Be it understood that in respect of all coals despatched by the East Indian Railway Company royalty would be paid at the present fixed rates, but if, in future, the Bengal-Nagpur Railway being constructed the freight on coal is reduced by 2 annas or more per ton, then on all coals despatched in the aforesaid manner (ukta rupey) at reduced (Kom) rates royalty would be paid at 5 annas per ton of steam coal, steam rubble, hard and soft coke, and 2 annas 6 pies per ton of brick-burning rubble and dust, but if the aforesaid railway freight be reduced by less than 2 annas per ton, then the royalty for steam coal, steam rubble, hard and soft coke would be increased by the amount by which the freight on coal is reduced and that for brick-burning rubble and dust by one-half of that amount."

This translation was followed by Mr. Justice Beachcroft, and it was claimed on behalf of the appellant that it was more accurate than the official translation attached to the papers. It is not necessary, in their Lordships' opinion, to go further into this question. Accepting the translation which the appellant claims to be more accurate their Lordships are of opinion that the judgment and decree of the High Court are correct, and that the case for the appellant fails.

The royalty clause fixes a royalty of 3 annas per ton of steam coal, steam rubble, hard and soft coke, and of 1 anna 6 pies per ton of brick-burning rubble and dust, raised and despatched or sold by the lessee. These latter words are important in construing the clause. A contrast is drawn between coal or rubble despatched and coal or rubble sold at

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the pit's mouth, and the claim for an enhanced royalty on coal is made in respect of coal despatched by rail. It does not appear, and it is not material, whether at the date of the lease any coal was despatched in any other way than by rail. The only railway which served the coal-field at the date of the lease was that of the East Indian Company. The clause provides that royalties at the present fixed rate should be paid on all coal despatched by the East Indian Company, subject, however, to a future contingency:—

"But if, in future, the Bengal Nagpur Railway being constructed the freight on coal is reduced by 2 annas or more per ton, then on all coals despatched in the aforesaid manner (ukta rupey) at reduced (Kom) rates royalty would be paid at 5 annas per ton of steam coal, steam rubble, hard and soft coke, and 2 annas 6 pies per ton of brickburning rubble and dust."

The Bengal Nagpur-Railway has been constructed, and it has been correctly held in both Courts that, as a consequence of this construction, a readjustment was made in the freight on coal. It was further assumed throughout the hearing, both before the Subordinate Judge and in the High Court, that in the re-adjustment, the freight on coal had been reduced by more than 2 annas per ton as compared with the freight in operation on the East Indian Company's line at the date of the lease. On this finding and assumption the contingency on which an enhanced royalty would become payable has become operative, but it is said that this enhanced royalty is only payable in respect of coals sent over the Bengal-Nagpur line and only so far as the Bengal-Nagpur Railway Company charge a differential rate less than the rate charged by the East Indian Railway Company.

Their Lordships cannot find any reference to such a differential rate in the terms of the clause or any support for the argument of the appellant under this head. The decision of the Subordinate Judge is rested on evidence of the intention of the parties to the deed, but this evidence is clearly inadmissible. In construing the terms of a deed the question is not what the parties may have intended, but what is the meaning of the words which they used.

Apart from any question of differential rate, it is clear from the context that the words "coals despatched in the aforesaid manner at reduced rates" cannot be restricted as applicable only to coals sent over the Bengal-Nagpur system. At the date when the lease was executed, no coals had been despatched over

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the Bengal-Nagpur system, and the deed speaks from the date of its execution. It might be argued that, grammatically, the words in question referred only to coals despatched by the East Indian Company, but this construction would be adverse to the contention of the appellant. If the words in question are not limited in their application to coals despatched by the East Indian Company, they must refer back to the earlier context in the clause and include all coals despatched by rail at a reduced rate, either by the East Indian Company or the Bengal-Nagpur Company. Their Lordships are of opinion that this is what the words naturally mean, and agree in the judgment of the High Court.

At the hearing of the appeal, counsel for the appellant claimed to raise the question that in any event there had been no reduction of rate within the meaning of the clause, inasmuch as the old rate of rupees 3: 11 was a company's risk rate, and the present rate of rupees 3: 2 is based upon a special consignment note signed by the consignor, providing that the coal should be carried at owner's risk. This issue, though raised in the pleadings and in the reasons attached to the appellant's case on appeal, was not raised either before the Subordinate Judge or in the High Court. It was assumed in both Courts that a reduction in coal rates sufficient in amount to justify a claim for an enhanced royalty had been made within the meaning of the royalty clause. Under these circumstances, and in the absence of any exceptional conditions, their Lordships held that it was not open to the appellant to raise as a fresh point on appeal, an issue which should have been raised before the Subordinate Judge or the High Court, and might then have been raised in a convenient form and at an opportune time, and that there was no valid reason in the present case for departing from the established practice in the Privy Council.

In the opinion of their Lordships, the case for the appellant fails, and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for Appellant:—*Watkins and Hunter.*

Solicitors for Respondent:—*E. Delgado.*

A. P. P.

PRIVY COUNCIL.

Present:—Lord Parker of Waddington, Lord Sumner, Sir John Edge and Sir Lawrence Jenkins.

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Raja Ranjit Singh Bahadur ... *Defendant** (*Appellant*).

v.

Srimati Kali Dasi Debi and others ... *Plaintiffs* (*Respondents*).

Twenty Consolidated Appeals.

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Ranjit Singh Bahadur *v.* Kali Dasi Debi.

Patni Tenure—Chowkidari Chakeran lands—Bengal Permanent Settlement—Bengal Act 6 *of* 1870 (*The Village Chowkidari Act,* 1870) *Ss.* 49, 50, 51—*Bengal Regulation* 8 *of* 1793, *Ss.* 36, 37, 38, 39, 40, 41.

Chowkidari Chakeran lands resumed by Government and transferred to the Zemindar under Bengal Act 6 of 1870, pass by virtue of such transfer to the holder of a Patni lease of the villages within which such lands are situate.

The *prima facie* title of the Zemindar to Chakeran lands within his district is recognised by the Permanent Settlement. The Zemindar's interest in such lands, in the absence of express provision to the contrary, passes under a patni grant.

Not only does Bengal Act 6 of 1870 recognise the existing title of the Zamindar to the lands resumed, but the estate taken by the Zamindar under the order of transfer is in confirmation and by way of continuance of his existing estate, and when the Zemindar or those through whom he claims has or have entered into contracts affecting his existing estate the rights of third parties under these contracts are preserved.

Consolidated Appeals from two judgments and twenty decrees of the Calcutta High Court, passed in second appeal from various Courts in the Birbhum District.

Twenty suits were brought by various plaintiffs to recover possession from the defendant Raja, who holds large Zamindaris in the Birbhum district of Chowkidari Chakeran lands resumed by Government and transferred to him under Bengal Act 6 of 1870. Each plaintiff was the Patnidar or Darpatnidar of the village within which the lands subject of the suit were situate. In those suits in which the Darpatnidar was plaintiff, the patnidar was made a defendant. The decree in each suit was in favour of plaintiff and was confirmed on appeal by the High Court.

Hence this appeal.

De Gruyther, K. C., and *Eddis* for Appellant.

Sir H. Erle Richards, K. C., Dunne, and *H. N. Sen,* for *Punchanani Dasi* (respondent in several appeals).

* 16th, 17th and 22nd November 1916.

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Ranjit Singh Bahadur v. Kali Dasi Debi.

Sir W. Garth for *Mina Kumari Debi* (respondent in one Appeal.)

Several other respondents did not appear.

De Gruyther, K. C., for Appellant:—The village Chowkidari Act, 1870 (Bengal Act 6 of 1870) does not apply to Chowkidari Chakeran lands unless they were excluded from the revenue settlement. The onus of showing that they were so excluded is on the Government. The very fact of these lands falling under the Act shows that they were not included in those settled with the Zemindar. *Secretary of State* v. *Kirtibas Bhupati Harichandan Mahapatra* [1], *Ram Chandra Bhanj Deo* v. *Secretary of State* [2].

Here the Chowkidari Chakeran lands did not belong to the Zemindar at the date of the patni leases. The profits of these lands were not taken into account in fixing the assessment. The Zemindar had no right in the lands under Bengal Regulation 8 of 1793; he merely had a certain call on the services of the Chowkidars. Bengal Regulation 22 of 1793 gives the right of nominating Chowkidars to the Zemindar: there is no authority to the effect that such right passed to the patnidars and no suggestion that the patnidars in fact exercised such right.

Bengal Regulation 8 of 1793 is relied on as showing that the Zemindar had the proprietary right in these lands, but S. 4 of that Regulation only covers cases where Government assessed rent or revenue on the lands. Here no revenue was assessed.

Our title to these lands is a new title under Act 6 of 1870 arising long after the patni leases were made.

At first the Police in Bengal came under the Zemindars—Harrington's Analysis, Vol. I, pp 459, 513. The Zemindars entertained Tannahdars and Pykes, and remunerated them either by assigning them Chakeran lands or by money. In the calculation of the giver the profits of such Chakeran lands were not brought into account, and deductions were made in favour of the Zemindar for money payments made by him. This was altered by Regulation 1 of 1793, S. 8 (4). The policec ontrol was taken away from the Zemindars; the allowances were resumed, and the lands assigned by the Zamindars were let to them until Act 6 of 1870,

1. (1914) L.R. 42 I. A. 30 (31, 39, 42)=I.L.R. 42 C. 710=28 M.L.J. 457.
2. (1916) L. R. 43 I. A 172=I. L. R. 43 C. 1104=31 M. L. J. 745.

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after and in consequence of which they were given the proprietary right in such lands:—*Jeykissen Mukerji* v. *Collector of East Burdwan* [1], *Secretary of State* v. *Kirtibas Bhupati Harichandan Mahapatra* [2].

Reference was also made to *Hariprasanna Majumdar* v. *Makundal Lal Mandal* [3], *Upendra Narain Bhuttacharjee* v. *Pratap Chunder Pardhan* [4], *Kashi Sheik* v. *Prasanna Kumar Mukerji* [5], *Ranjit Singh* v. *Radha Charan Chandra* [6], *Janab Ali* v. *Rakibuddin* [7] *Kazi Newaz Khuda* v. *Ram Jadu Dey* [8] *and Binode Lal Pakrashi* v. *Kalu Paramanik* [9].

Eddis followed.

Sir H. Erle Richards, K. C., for Respondent (Panchanani Dasi):—There are three obstacles to Appellant's case.

(1) S. 41 of Reg. 3 of 1793.

(2) The matter is concluded by *Jeykissen Mukerji* v. *Collector of East Burdwan* [1].

(3) There has been at Calcutta a current of decisions against his contentions, extending from 1900 till now, with the one exception of *Kashi Sheik* v. *Prasanna Kumar Mukerji* [5], which is to some extent in his favour.

I have in my favour findings of fact that the lands are within the ambit of my patni and that the Chowkidars were in my service. Appellant's contention that the lands did not belong to him as Zemindar was not raised in the Courts below, where the question argued was limitation. The present question is one of fact and cannot be raised now.

Apart from this contention the appeal fails on the merits. Lakhiraj lands are dealt with in S. 36 of Bengal Reg. 8 of 1793; S. 41 lays down in terms that Chakeran lands are not meant to be included in the exception contained in S. 36 and are declared responsible for the public revenue. If, as is now contended, these lands belonged to Government independently, there is no sense in making them security for the revenue. Lord Kings-

1. (1864) 10 M. I. A. 16 (17, 18, 20).
2. (1914) L. R. 42 I. A. 30 (31, 34, 42); I. L. R. 42 Cal. 710.
3. (1900) 4 C. W. N. 814, 817.
4. (1904) I. L. R. 31 Cal. 703
5. (1906) I. L. R. 33. Cal. 596.
6. (1907) I. L. R. 34 Cal. 564.
7. (1905) 9 C. W. N 571.
8. (1907) I. L. R 34 Cal. 109.
9. (1893) I. L. R. 20 Cal. 706.

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down, in *Jeykissen Mukerji's case* [1] explains that Chakeran lands were included in the Malguzari lands for the purpose of securing the assessment, because in the event of a sale for non-payment, it was important they should be transferred to the purchasers, with whom the appointment of the Chowkidaris would vest.

There is a direct decision of the Calcutta High Court against Appellant's contention. *Kazi Newaz Khuda* v. *Ram Jadu Dey* [2].

The same point arose, but was not even argued, in *Banwari Mukunda Deb* v. *Bidhu Sundar Thakur* [3]. The case of *Secretary of State* v. *Kirtibas Bhupati Harichandan* [4] is really against appellant; it lays down that the Zemindar is entitled as such to Chowkidari Chakeran lands within his zemindari. The same principle is recognised in *Ram Chandra Bhanj Deo* v. *Secretary of State* [5].

By S. 51 of Act 6 of 1870, the transfer of Chakeran lands to the Zemindar under that Act is subject to all contracts there tofore made &c. Patni leases are contracts within the meaning of that section.

Eddis in reply :—Our point was taken in the Original Court and is still open to us.

We do not say *Secretary of State* v. *Kritibas Bhupati* [1] is wrong; we rely on it. In that case the lands were lands belonging to the Zemindar assessed to revenue, but assigned by the Zemindar for service purpose, and therefore though called Chowkidari Chakeran lands, did not fall within the definition in Act 6 of 1870. This is the converse case : the lands here are lands not assessed to revenue and falling within the definition.

Their Lordships' judgment was delivered (January 24, 1917) by

Lord Parker of Waddington.

Lord Parker of Waddington :—This is a consolidated appeal from decrees of the High Court of Judicature at Fort William in Bengal, made in twenty suits, each of which, though relating to a distinct subject-matter raised substantially the same questions of law. Each suit was in substance a suit to recover possession from the appellant, who is the registered proprietor of

1. (1864) 10 M. I. A. 16 at p. 45.
2. (1907) I. L. R. 34 C. 109.
3. (1908) I. L. R. 35 C. 346.
4. (1914) L. R. 42 I. A. 30=I. L. R. 42 C 710
5. (1916) L. R. 43 I. A. 172 I. L. R.=I. L. R. 43 C. 1104.

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extensive Zemindaries in the Birbhum District of Bengal, of Chowkidari Chakeran lands recently resumed by Government and transferred to him under the provisions of Act VI of 1870 of the Bengal Council. The plaintiff in each suit was the Putnidar or Darputnidar of the village within the boundaries of which the lands the subject of the suit were situate. In those suits in which the Darputnidar was the plaintiff, the Putnidar was made a defendant, but took no part in the argument. The decree in each suit was in favour of the plaintiff and against the appellant.

Their Lordships consider it unnecessary to deal at further length with the history of the litigation. It is abundantly clear from the facts found in the Courts below, and was not disputed before their Lordships' board that any interest which the appellant or his predecessors in title, originally had in the lands the subject of each suit had, prior to the resumption and transfer of such lands under the Act of 1870, been transferred to and become vested in the plaintiff Putnidar or Darputnidar by virtue of the lease or sub-lease under which he held the villages in which these lands were situate. Two points only were argued before their Lordships. It was contended, *first*, that the proprietor with whom a Zemindari was settled under the Bengal Permanent Settlement, did not obtain or retain in the Chowkidari Chakeran lands situate within the territorial boundaries of a village comprised in his Zemindari any interest capable of being made the subject of a Putni lease; and *secondly*, that even if he obtained or retained any such interest, the effect of the Act of 1870 was to confer on him a new title not in any way affected by any Putni lease theretofore granted by him or his predecessors in title. In order to arrive at a conclusion on these questions, it is necessary to consider (1) the nature of Chowkidari Chakeran lands, (2) the provisions of the Bengal Permanent Settlement, and (3) the true meaning and effect of the Act.

At the time of the English occupation a Zemindar was responsible not only for the payment of the revenue, but for the preservation of peace and order within his district. For the latter purpose he maintained Tannahdars, or Police officials, and Chowkidars, or village watchmen. Both had from time immemorial been remunerated by allotments of land to be held

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in consideration of the services they rendered to the Zemindar, either rent-free or at a low rent, but whereas the Police official rendered police service only, the Chowkidar not only assisted the police, but rendered acts of service personal to the Zemindar. Chakeran lands are lands held by service tenure. Generically the term includes all lands so held, whether by Police officials, Chowkidars, or persons whose only duties are personal to the Zemindar. The expression "Tannahdari lands or Tannahdari Chakeran lands" means lands held on service tenure by Tannahdars or Police officials. The expression "Chowkidari Chakeran lands" means lands held on service tenure by Chowkidars, or village watchmen. As one would naturally expect, it had long been customary, in fixing the revenue or jumma payable for the Zemindari, to leave Tannahdari and Chowkidari Chakeran lands out of account.

Passing to the settlement of 1793, it appears to their Lordships to be beyond controversy that whatever doubts be entertained as to whether before the English occupation the Zemindars had any proprietary interest in the lands comprised within their respective districts, the settlement itself recognises and proceeds on the footing that they are the actual proprietors of the land for which they undertake to pay the Government revenue. The settlement is expressly made with the "Zemindars, independent Talukdars and other actual proprietors of the soil" (see Regulation I, S. 3 and Regulation VIII, Section 4). It is clear that since the settlement the Zemindars have had at least a *prima facie* title to all lands for which they pay revenue, such lands being commonly referred to as Malguzar lands. See the case of *Rajah Sahib* v. *Perhlad Sein* [1].

Bearing this in mind, their Lordships will proceed to consider the regulations of the permanent settlement, so far as they deal with Chakeran lands. The leading authority on this subject is *Joykishen* v. *Collector of East Burdwan* [2]. To use Lord Kingsdown's expression in that case, the effect of the settlement is to divide Chakeran lands into two classes, namely, (1) Tannahdari Chakeran lands, that is, lands held on service tenure by Police officials, and (2) all other Chakeran lands. As to Chakeran lands of the former class, they were by Bengal Regulation I, S. 8, clause 4, made resumable by Government, the

1. (1869) 12 M. I. A. 289, at p. 331. 2. (1864) 10 M. I. A. 16.

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Government relieving the Zemindar from the duty of maintaining a Police establishment. These Tannadhari Chakeran lands were, in fact, shortly afterwards resumed and became Government lands, the title of the Zemindar being extinguished by such resumption. As to all other Chakeran lands, whether held by public officers or private servants in lieu of wages, they are dealt with by Bengal Regulation VIII, S. 41.

In order to understand the 41st Section of the last, mentioned Regulation, it is necessary to refer to some of the preceding sections. By virtue of the 36th Section the assessment is to be fixed exclusive and independent of all existing Lakhiraj lands, that is, lands exempted from the public revenue. Such lands are therefore in effect withdrawn from the settlement, and the Zemindar, though these lands might be locally situated within his district, could claim no title therein by virtue of the settlement.

Ss. 37 to 40 deal with certain lands referred to as "private lands" of the Zemindars. By S. 37 these are not to be included in the Lakhiraj lands referred to in S. 36, and special directions with regard to them are given in Ss. 38, 39, and 40. Speaking generally, such lands are not excluded from, but on the contrary are included in the settlement. Then comes the 41st section dealing with Chakeran lands; these, whether held by public officers or private servants in lieu of wages are also not to be included in the Lakhiraj lands referred to in S. 36. They are to be annexed to the Malguzari lands and declared responsible for the public revenue assessed on the Zemindaries in which they are included in common with all other Malguzari lands therein.

Ss. 37 to 41 inclusive appear to their Lordships to suggest that neither the "private lands" of the Zemindars nor Chakeran lands had theretofore been taken into account in fixing the revenue for which the Zemindar was responsible to Government. Otherwise there would be no point in excluding them from the Lakhiraj lands dealt with by S. 36. However this may be with regard to the private lands of the Zemindar or with regard to Chakeran lands, the services for which were purely personal to the Zamindar, it is quite clear that Tannadhari and Chowkidari Chakeran lands, the services for which involved the performance of duties in which the public was interested, had not, as a rule, been taken into account for the purpose of increasing the jumma.

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The effect of Section 41 appears to be this: The question whether any of the Chakeran lands therein referred to ought to be taken into account for the purpose of increasing the jumma is left to be determined by the custom which had hitherto prevailed or any special directions contained in the regulations. But whether or not so taken into account, all Chakeran lands are to be considered Malguzari for the purpose of ascertaining the lands in respect of which the jumma is paid and upon which it is secured. The *primâ facie* title of the Zemindar to Chakeran lands within his district is thus recognised by the settlement. Tannadhari Chakeran lands may be resumed under Regulation I, Section 8, clause 4, but with regard to all other Chakeran lands, if resumable at all, they can be resumed by the Zemindar alone. In the case however of Chowkidari Chakeran lands, not even the Zemindar may be entitled to resume them, for Chowkidars have public duties to perform and the lands which they hold on service tenure as remuneration for the performance of such duties are to that extent appropriated or assigned for public purposes. Subject, nevertheless, to the requirements of the public interest, the Zemindar is the owner and as such is entitled to the enjoyment of any personal services which the Chowkidars ought to render and when vacancies occur to appoint others in their place. All this follows from what was said by Lord Kingsdown in *Joykishen* v. *Collector of East Burdwan* [1].

Such, then, being the Zemindar's interest in Chowkidari Chakeran lands within his district, it is difficult to see why this interest should not be made the subject of a putni grant. That it could be so made appears to have been admitted in the last mentioned case, and the whole of Lord Kingsdown's judgment proceeds on that footing. In their Lordships' opinion, there can be no reasonable doubt on this matter. Indeed, the only argument to the contrary advanced by the appellant's counsel was based on certain expressions used by Mr. Ameer Ali in giving the reasons of the Board in the recent case of *The Secretary of State for India* v. *Kirthibas Bhupati Hari Chandan Mahapatra* [2]. In that case, which has little, if any, bearing on the questions now in controversy, the point for decision was whether the power of resumption conferred by Act VI of 1870

1. (1864) 10 M. I. A. 16 (17, 18, 20.) 2. (1914) L. R. 42 I. A. 30.

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extended to certain Chakeran lands which the Government had affected to resume thereunder. Here it is admitted by everyone that the powers of the Act were applicable. Moreover, it is abundantly clear that Mr. Ameer Ali, whatever expressions he used, did not intend to depart in the smallest degree from what had been laid down by Lord Kingsdown in *Joykishen* v. *Collector of East Burdwan* [1]. Under these circumstances, any argument based on a meticulous examination of isolated expressions used by him can, in their Lordships' opinion, have little weight.

It remains to consider the effect of a resumption by the Government of Chowkidari Chakeran lands under the provisions of Act VI of 1870 of the Bengal Council.

It should be observed that the definition of Chowkidari Chakeran lands contained in the Act refers not only to the public duties of Chowkidars, but also to their personal duties to the Zemindar. It is apparently for this reason that the revenue assessment in the lands resumed is, by S. 49, fixed at only one-half of the annual value of such lands. If the Zemindar had no interest, the effect of this provision would be to make him a free gift of half of the value of the lands resumed. It appears to be for the same reason that the Zemindar is, under S. 50, entitled to contest the correctness of any assessment which is made. After the assessment is complete the Collector is, under S. 50 by order in the scheduled form, to transfer the land to the Zemindar subject to the assessment. By S. 51 such order operates to transfer the land to the Zemindar subject to such assessment and "subject to all contracts theretofore made in respect of, under or by virtue of which any person other than the Zemindar may have any right to any land, portion of his estate, or tenure in the place in which such land may be situate." The latter words may not be very happily chosen, but their obvious intention is to preserve the rights of third parties. They contemplate a case in which the village in which the resumed lands are situate has been made the subject of a contract by the Zemindar, or those through whom he claims and that under this contract some third party may have an interest in the lands resumed. They are wide enough to include, and in their Lordships' opinion do include, the rights of

1. (1864) 10 M. I. A. 16 (17, 18, 20).

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a Putnidar under a Putni grant by virtue of which the Putnidar is lessee of the Zemindar's interest in the lands resumed, and also the rights of a Darputnidar under a Darputni grant. In their Lordships' opinion, therefore, not only does the Act recognise the existing title of the Zemindar to the lands resumed, but the estate taken by the Zemindar under the order of transfer is in confirmation and by way of continuance of his existing estate, and when the Zemindar or those through whom he claims has or have entered into contracts affecting his existing estate the rights of third parties under these contracts are preserved. It is a satisfaction to their Lordships to find that the view above expressed is that hitherto almost universally adopted in the Indian Courts.

The result is that the appeal fails and should be dismissed, and their Lordships will humbly advise His Majesty accordingly. With regard to costs, the appellant should pay to the respondents who have appeared one set of costs between them, but these should, having regard to the terms on which leave to appeal was granted, be as between solicitor and client.

Solicitors for Appellant:—*Downer and Johnson.*

Solicitors for Respondent Panchanani Dasi:—*Watkins and Hunter.*

Solicitor for Respondent Mina Kumari Debi:—*G. C. Farr.*

A. P. P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS. [FULL BENCH.]

Present:—Sir John Wallis, *Chief Justice*, Mr. Justice Abdur Rahim, and Mr. Justice Srinivasa Aiyangar.

T. Rangayya Reddy ... *Appellant* * *(2nd Defendant)*.

v.

V. R. Subrahmanya Aiyar and others. *Respondents (Plaintiffs and Defendants 1, 3 and 5).*

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Rangayya Reddy *v.* Subrahmanya Aiyar.

Specific performance—Agreement to sell a share of certain items of family property by a member of joint family—Suit for specific performance of contract and partition against all the members—Civil Procedure Code O. 1, R. 3—Specific Relief Act, S. 27—Rights of the contractee under the agreement.

Where the first defendant a member of a Mitakshara joint family agreed to sell his share in certain properties of the joint family, defendants 2 to 5 being the other members and the plaintiff instituted a suit for specific performance of the contract and for partition of the shares in those properties against defendants 1 to 5 and prior to the suit but subsequent to the agreement to sell, a partition decree was passed on compromise by which the properties agreed to be sold fell to the share of the other members.

Held (per Wallis C.J., and *Srinivasa Aiyangar, J, Abdur Rahim, J. dissenting)*:—In a suit for specific performance of a contract by a member of an undivided Hindu family to sell his share, it is not permissible to join the other members of the family as defendants merely with a view to obtaining partition and possession of the alleged vendor's share as against them.

A partition involves the release of the interest of one of the co-parceners in the properties allotted to one of them and though by virtue of their prior title defendants 2 to 5 may be entitled to a release from the 1st defendant of his interest in the properties, the subject of the present suit, if these properties were allotted to them in a fair partition without their being affected by the contract to sell which can only operate subject to their rights, yet if the partition is proved to be a fraudulent design to defeat the rights of the plaintiff under his contract by the first defendant giving up the chance of the suit properties or a share in them being allotted to him in a fair division, defendants 2 to 5 may be treated as subsequent transferees with notice and would consequently be proper parties to the suit.

The right to sue for partition does not arise till after the legal title is transferred and when the suit was instituted in the present case, the plaintiff had no right to sue for partition at all.

Per Srinivasa Aiyangar, J.—If there was an existing cause of action for partition on the date of the suit, the question whether the two causes of action, the one for specific performance and the other for partition and possession can be joined in one suit, would depend not only on the provisions of O. 1, Rr. 3 and 5 which primarily regulate the joinder of parties but also of O. 1, Rr. 3 and 4 which provide for joinder of causes of action.

Per Abdur Rahim, J.—By reason of the wide language of O. 1, R. 3, the suit is not one which is bad for misjoinder of parties. That the suit is one for specific performance of a contract does not make any difference in the application of the rule.

* A. A. O. No. 279 of 1915. 16th January, 1917.

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Applying S. 27 (c) of the Specific Relief Act to the facts of the case defendants 2 to 5 are proper parties to the suit and specific performance can be enforced against them also.

Per Oldfield and Sadasiva Aiyar, JJ.—Where a member of a Hindu family agreed to convey a specific item of joint family property to another person, the latter is entitled to a conveyance by that member of the joint family of that item and such conveyance entitles him to demand a partition of the family properties and entitles him either to the specified property or to its equivalent from the other properties falling to the share of that member.

Observations in *Duvvur Subba Reddy* v. *Kakuturu Venkatarami Reddy* [1], dissented from.

Per Sadasiva Aiyar, J.—Where a plaintiff is directed to amend his plaint and he fails to so amend it, the plaint should not be rejected, but the court itself should exercise its powers under O. 6, Rr. 16 and 17 to strike and amend all matters which tend to prejudice, embarass or delay the fair trial of the suit and in such manner and on such terms as may be just.

Appeal against the order of the District Court of North Arcot in A. S. No. 338 of 1914, preferred against the decree of the Court of the Subordinate Judge of North Arcot in Original Suit No. 73 of 1913.

The Court (Oldfield and Sadasiva Aiyar, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH :

Oldfield, J.

Oldfield, J.:—Plaintiffs claim in this suit, first specific performance of a contract by first defendant to sell and secondly, as consequential relief, possession of the property sold by means of a partition, to which 1st to 5th defendants, the members of the joint family it belonged to at the date of the contract, will be necessary parties. The main question argued is whether this constitutes misjoinder. The Subordinate Judge held that it did, gave plaintiffs an opportunity to withdraw their consequential claim and, as they did not do so, dismissed the suit. The District Judge in the order under appeal directed separate trials of the two claims under Order II, Rule 6 and then struck out the prayer for partition without, as I understand him, making it plain that it was reserved for separate disposal.

The matter is further complicated by the fact that the contract is alleged as being for the sale, not of 1st defendant's unascertained share or any particular part of it, but of his share in certain specified lands, which of course may or may not fall to him, when the partition takes place. It will be simplest to deal first with the question raised in its more general form, whether claims for

1. (1914) 16 M. L. T. 370.

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specific performance against a vendor and possession by means of partition against him and his coparceners can be made in one suit. If the answer is in the affirmative, it will be necessary secondly to decide whether such a suit is sustainable, when it is brought in respect of the sale of and for possession of specified properties, and whether any amendment of the plaint can make it so.

Firstly as regards misjoinder, we have no doubt been shown no decision, in which such a suit as this was permitted expressly. But this and other High Courts have held, as for instance in *Bugata Appala Naidu* v. *Chengalvala Jogiraju* [1] and *Madan Mohun Singh* v. *Gaja Prasad Singh* [2] that a suit against a vendor for both specific performance and possession is sustainable; and it is well established (Mayne's Hindu Law, 8th Edition, p. 488) that a suit will lie against a vendor and his coparceners for partition and possession by the purchaser of an unascertained share of family property or a portion of one. It is then difficult to understand why all these reliefs should not be asked for in one suit. For, the purchaser's right to sue for possession as well as specific performance once recognised, if the objection is only that the right to sue the vendor for possession involves none to sue others, who claim jointly with him, the contrary is entailed by the second principle just referred to. And again with reference to the wording of Order 1, Rule 3 and such cases as *Sri Raja Simhadri Appa Rao* v. *Prattipati Ramayya* [3], *Aiyathurai Ravuthan* v. *Santhu Meera Ravuthan* [4] and *Kovvuri Basivi Reddi* v. *Tallapragada Nagamma* [5]. I should be inclined to hold that there is no misjoinder in the present case, the claim to relief against all the defendants arising in respect of the same transaction, plaintiffs' purchase and the common question between them and each of the defendants being of the share, to which they through 1st defendant would be entitled on a fair partition.

Defendants' objection to this conclusion is based mainly on the character of the transaction, on which the suit is founded, as a contract specific performance of which is asked for, and the particular rule alleged by them to be applicable to such suits, that strangers to the contract cannot be parties to them; and this general principle is no doubt laid down at page 94, Fry on Specific Performance, 5th Edition, and in numerous cases, the

1. (1916) 1 M. W. N. 77.
2. (1911) 14 C. L. J. 159.
3. (1906) I. L. R. 29 M. 29.
4. (1908) I. L. R. 31 M. 252.
5. (1912) I. L. R. 35 M. 39.

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most apposite being *Tasker* v. *Small*[1] and *Bugata Appala Naidu* v. *Chengalvala Jogiraju*[2] already referred to. But defendants' argument takes no account of the circumstances, in which the principle was applied in these cases or the exceptions to it allowed in others. In each of the cases cited the stranger in question held, as defendants do here, under a title, which originated prior to the contract of sale. But he was a mortgagee and, as was pointed out in *Tasker* v. *Small*[1] he would not be bound to surrender the property on that contract being enforced or until he was redeemed, which might never happen, and he had no concern with the adjudication between the plaintiff and the mortgagor on the question which would be entitled to redeem him. So also in Second Appeals Nos. 442 and 443 of 1915 referred to by my learned brother, the third persons in question were sued as tenants, who could be ousted from possession, only when their tenancy expired, and who had no direct interest in the decision of the suit for specific performance. In the case before us the plaintiffs' claim to possession against the stranger defendants is not contingent on anything except the enforceability of the contract of sale. For, when that is declared, former's right to possession will arise immediately, not the less because it can be made effective only by the legal method, a partition to which 1 to 5 defendants are parties and which 1st defendant could at any time have demanded.

Reference postponed to the plaint allegations regarding the partition, which has actually been made, the foregoing entails that 2nd to 5th defendants' title though prior to the contract and known to plaintiffs, might have been displaced by 1st defendant; and then reference to S. 27 *(c)* of the Specific Relief Act affords an answer to 2nd to 5th defendants' objection. That this clause applies to contracts for the sale of the unascertained share of a joint tenant appears from the second illustration to it. The illustration is no doubt the case of a vendor, who might have displaced his joint tenant's title but for his death, not as here, of one who has evaded his duty to displace it. That may be because the two English cases, referred to at page 1031, Dart on Vendors and Purchasers, 7th Edition, Vol. II, as authority for the doctrine, deal only with its application to a surviving joint tenant. But it

1. (1837) 3 My. and Cr. 63. 2. (1916) 1 M. W. N. 77.

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is stated by the learned author, as it is in the Act, without qualification; and it must therefore be applied to the case before us.

It is not the less applicable, because the plaint contains an admission that a suit for a partition, brought by 1st defendant against 2nd to 5th defendants, was in progress when the contract to sell was made. For, if that suit was contested honestly, 2nd to 5th defendants can claim at most that plaintiffs' right under their contract is restricted to receiving whatever they are entitled to from the property awarded to 1st defendant under the decree, which has been passed. Plaintiffs however allege (it must be assumed for the present purpose, truly) that the suit was not contested honestly and that the compromise decree, in which it ended and which awarded to 1st defendant a large proportion of his share in cash and a small proportion in land, was intended to defraud them and to defeat their rights under their contract, of which 2nd and 5th defendants had known throughout. They therefore contend in accordance was *Fateh Chand* v. *Narsing Das* [1], that the partition under that decree should not prejudice them and that a fresh partition should be made. These allegations afford additional ground for the application of S. 27 (*c*), since they justify reference in support of it to *Mokund Lal* v. *Chotay Lall* [2], which was apparently, though not statedly, decided under it. There the stranger defendant was held to be a proper party, because he had combined with the vendor to defeat the purchaser's rights; and it cannot be a valid ground of distinction that there the device employed was possession under a *benami* title, whilst here it is the use of fraud affecting the fairness of the partition, by which the purchaser's rights are to be worked out. I therefore hold that in the circumstances stated there is no objection to a suit for specific performance, partition and possession against all these defendants.

The second question above stated calls for decision, because plaintiffs' contract was for the sale only of 1st defendant's share in certain specified items of property, not directly or in the alternative of his share, as it might be ascertained; and it may be mentioned that one part of the fraud imputed to defendants in connection with the partition above referred to is that they excluded all those items from 1st defendant's share. Their present

1. (1915) 22 C. L. J. 383.

2. (1884) I. L. R. 10 C. 1061.

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contention however is that, as laid down in *Duvvur Subba Reddy* v. *Kakuturu Venkatrami Reddy* [1]. "On the view that a co-parcener cannot alienate any specific property, no specific performance can be decreed" of a contract to alienate such property. This *dictum* was however *obiter*; and, with all respect, I can accept it only on the assumption that the learned Judge concerned was referring to a decree, not only for specific performance proper by execution of a conveyance, but also for possession, the two cases cited by him dealing with claims only to the latter. It is true that an alienee of specified property does not as of right acquire any interest in it. But it is well settled, and it was held by the same learned Judge in *Nanjaya Mudali* v. *Shunmuga Mudali* [2] that his conveyance enables him to demand a partition of the family property and entitles him either to the specified property, if that can equitably be assigned to his vendor's share, or to its equivalent from such other property, as that share may include. The rights conferred by such a document, though not necessarily those expressed in it, are not unsubstantial; and there is no reason why the law should refuse to enforce the contract to transfer them by compelling the execution of a sale deed in accordance with it. The plaint before us no doubt is defective in so far as it asks for possession under the sale deed to be executed only of the specified properties. But Mr. Govindaraghava Iyer on behalf of plaintiffs has undertaken to make any necessary amendment, and his clients would probably have amended in the Lower Courts, if they had been asked to do so. The proper form of prayer is that given in the statement of facts in *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya* [3] and the plaint, amended in accordance with it, would in my opinion be open to no objection.

I would therefore set aside the decrees of the Lower Courts and remand the suit to the Subordinate Court with directions to restore it and

1. To give plaintiffs a reasonable opportunity to amend as directed above.

2. If such amendment is made, to dispose of the suit according to law.

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1. (1914) 16 M. L. T. 370. 2. (1914) 26 M. L. J. 576=38 M. 684.
3. (1902) I. L. R. 25 M. 690.

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3. If it is not made, to dismiss the suit so far as it relates to partition and possession and dispose of it so far as it relates to specific performance. In accordance with the foregoing I would dismiss the appeal against order and allow the memorandum of objections.

As however my learned brother differs, we refer to a Full Bench the questions

1. Whether 2 to 5 defendants are proper parties to the suit ?

2. Whether the relief of partition and possession can be claimed by plaintiffs in one suit as well as execution of a sale deed ?

Sadasiva Aiyar, J.

Sadasiva Aiyar, J.—The facts have been set out in the Judgment of my learned brother which I had the advantage of studying before writing my own.

I am unable to distinguish on principle the case in *Tasker* v. *Small* [1], from the present case in respect of the question whether in a suit for specific performance a claim for possession againt persons other than the vendor could be joined. That case, *Tasker* v. *Small* [1], was recognised as good law in *Bugata Appala Naidu* v. *Chengalvala Jogiraju* [2]. The case in *Bugata Appala Naidu* v. *Chengalvala Jogiraju* [2] was followed in the recent Judgment (dated 27th July 1916) in S. A. Nos. 442 and 443 of 1915 decided by this Bench. I shall quote two sentences from our Judgment in the last case. "The remaining argument is that the 3rd and the 4th defendants should not have been made parties, because the contract to which they were strangers, between the plaintiff and 1st and 2nd defendants was for the sale of the land and did not include the giving of possession of it by the last mentioned." "In the absence of an argument to give possession, there is nothing against our applying the principle enunciated in *Bugata Appala Naidu* v. *Chengalvala Jogiraju* [2], and holding that the 3rd and 4th defendants are not proper parties to the suit."

As regards the argument based on Order 1, Rule 3 of the Code of Civil Procedure, I do not think that the act or transaction which is the plaintiffs' cause of action entitling them to claim the relief of specific performance against the 1st defendant gives them also the right to the relief of partition and separate

1. (1837) 3 My and Cr. 63. 2. (1916) I, M. W. N. 77.

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possession of 1/3 share from the defendants 2 to 5. The transaction which would entitle them to such relief against the defendants 2 to 5 *had yet to come into existence*, namely, the execution by the 1st defendant (or on behalf of the 1st defendant by the Court) of a proper conveyance of the 1st defendant's 1/3 share. I entirely agree with the principles of law, enunciated by Tyabji, J. in the case reported in *Krishnammal* v. *Soundararaja Aiyar* [1]. Though, where only the vendor and persons claiming by title subsequent to the plaintiffs' contract or persons whose title may be displaced by the vendor are joined as parties, the relief for the specific performance of a contract of sale can be supplemented by a prayer for possession, (such joinder being allowed for the sake of convenience and to prevent useless multiplicity of suits), I do not think that the plaintiffs could be allowed to join in the same suit *a future cause of action* for partition against third persons (which cause of action could not vest in the plaintiffs till they get a conveyance from their vendor) along with the existing cause of action against the contractor (promisor) to obtain the specific performance of the contract, namely, the execution of the conveyance. The "right to relief" and "the same act or transaction or series of acts and transactions" mentioned in Order 1, Rule 3 must "exist" on the date of suit for the privilege granted by that section to be taken advantage of whereas the right to relief of partition and possession had in this case to come into existence, even if all the plaint allegations were true. As Tyabji, J. puts it in *Krishnammal* v. *Soundararaja Aiyar* [1], "The effect of S. 55 (1) of the Transfer of Property Act, when read with S. 54 of the same Act and with the Registration Act, is that in the absence of an express agreement to transfer possession, independently of the registered conveyance, the purchaser—(or to be accurate, the person agreeing to purchase)—has no right to the possession of the property until the conveyance is completed." It follows *a fortiori* that he nas no right to sue strangers to the contract for partition and possession till *he* gets his conveyance. Such a suit for partition and possession against strangers would clearly be premature.

As regards the contention based on S. 27 Clause (c) of the Specific Relief Act, I think the phrase, used in that section,

1. (1915) I. L. R. 38 M. 698.

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namely, "might have been displaced by the defendant" means "might have been displaced by the defendant according to his unilateral will and pleasure". This, I think is clear from the 2nd illustration to that clause. In the present case, the first defendant could not by his own will and pleasure, without reference to the consent of the defendants 2 to 5 or without obtaining a decree of Court (the Court having the power in a partition suit to allot properties according to its sense of justice and equity) have displaced the title of the defendants 2 to 5 to their undivided joint ownership and possession in the plaint three items. Further S. 27 Clause (c) relates only to the right to the *specific performance of the contract* against a third person claiming title and not to the question of the right *to bring a suit for recovery of possession* against the persons not parties to the contract. The second illustration to S. 27 Clause (c) (where it is said that C may *enforce the contract against B*) only means in my opinion that B might be directed to convey A's half share to C. If C also claims partition and possession of that half in the same suit and if B is in possession of the whole, the relief of partition and possession may also be granted (according to the practice of the Courts) in order to prevent multiplicity of suits *as the possession of no third party has to be disturbed*. It may be said that in *Bugata Appala Naidu* v. *Chengalvala Jogiraju*,[1] and Second Appeals Nos. 442 and 443 of 1915, S. 27 Clause (c) of the Specific Relief Act was not referred to. But for the reasons set out by me above as to the scope of that clause I do not consider it legitimate to distinguish those cases on that ground. I therefore agree with the learned Subordinate Judge that the plaintiffs ought to have amended the plaint by withdrawing the claim for partition and possession against the defendants 2 to 5 and by striking off the words in the plaint claiming partition and possession. They might, if so advised, have asked for the relief of possession as against the properties which fell to the 1st defendant's share in the partition decree already made as between the defendants but they must, in that case, abandon the contention that the decree in the partition suit was collusive and fraudulent.

The next question is whether on the plaintiffs' omission to amend as directed, the suit ought to have been dismissed wholly

1. (1916) 1 M. W. N. 77.

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as the Subordinate Judge did. Order 7, Rule 11 of the new Civil Procedure Code does not contain the clause *(d)* of S. 54 of the old Civil Procedure Code which provided that if the plaint is not amended within the time fixed by the Court, it should be rejected. I think that under those circumstances the Court itself (see O. 6, Rr. 16 and 17) ought to have exercised the power to strike out and amend all matters in the plaint which tend "to prejudice, embarrass or delay the fair trial of the suit" and "in such manner and on such terms as may be just." In the present case, not only is the plaintiff's claim against the defendants 2 to 5 premature, but they make allegations as to fraud, collusion, notice, the effect of the decree in another suit O. S. No. 8 of 1907 to which they were not parties and other matters (see paragraphs 3, 6, 7 and 8 of the plaint) which have nothing to do with their personal right against the 1st defendant to get a conveyance from the 1st defendant of the undivided ½ share which belonged to the 1st defendant on the date of the contract of sale. The trial of those matters along with the matters which directly and legitimately arise out of the contract of sale (which contract does not contain any stipulation as to the giving of possession) would clearly lead to embarrassment and delay. The Subordinate Judge ought, however, not to have dismissed the suit wholly for the reasons already given by me.

On the question whether the plaintiffs as purchasers of the undivided share of the 1st defendant *in some only of the family properties* are entitled to sue for specific performance, I agree with my learned brother for the reasons stated by him and I respectfully dissent from the view propounded in *Duvvur Subba Reddy* v. *Kakaturu Venkatrami Reddy* [1] on that point.

In the result, I would, in modification of the Lower Appellate Court's order remand the suit to the Subordinate Judge with directions to have the plaint amended by striking out the names of the defendants 2 to 5 and the prayers for partition and possession and by making any further consequential alterations, (the amendments to be made either through the plaintiffs or by the Court itself) and to proceed with the trial of the suit as so amended, costs hitherto abiding.

N. S. Rangasami Aiyangar for *T. Narasimha Aiyangar*, vakil for the Appellant.

1. (1914) 16 M. L. T. 370.

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L. A. Govindaraghava Aiyar and *K. N. Kumarasami Aiyar*, vakils for the 1st and 2nd Respondents.

The Full Bench expressed the following

Opinions:—*Wallis, C. J.*:—As regards the second question my answer is that, in a suit for specific performance of a contract by a member of an undivided Hindu family to sell his share, it is not permissible to join the other members of the family as defendants merely with a view to obtaining partition and possession of the alleged vendor's share as against them. It may I think be taken as the settled and salutary practice of this and other Courts in India where parties properly sued for specific performance of a contract for sale of land are in possession of the land to allow a prayer for possession to be added to the prayer for specific performance, thereby obviating the necessity for filing a fresh suit for possession to which there could be no defence. *Bugata Appala Naidu* v. *Chengalvala Jogiraju* [1]. It is however in my opinion quite a different thing to allow a stranger to make the members of a joint Hindu family defendants in a suit for a partition until he has established his right to sue for partition by obtaining a transfer from one of the members of the joint family.

The other members of the family were no parties to the alleged contract and therefore were not proper parties to the suit in so far as it is a suit for specific performance, and it would in my opinion be a distinct hardship to them to force them to defend a suit for partition which would not lie if the plaintiff failed to prove his contract. Partition suits often involve a great variety of complicated questions and it would not be satisfactory to deal with such a suit as a mere appendage to a suit for specific performance of a contract by a co-sharer to sell his share. The rule in *Tasker* v. *Small* [2], is not merely technical but well founded in principle. In *De Hoghton* v. *Money* [3], Turner L. J. observed, "Here again his case is met by *Tasker* v. *Small* in which case it was distinctly laid down that a purchaser cannot, before his contract is carried into effect, enforce against strangers to the contract equities attaching to the property, a rule which, as it seems to me, is well founded in principle, for if it were otherwise, this Court might be called upon to adjudicate upon

1. (1916) Vol. I, M. W. N. 77. 2. (1837) 3 My. and Cr. 63.
3. (1866) L. R. 2 Ch. 164.

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questions which might never arise, as it might appear that the contract either ought not to be, or could not be performed." Other cases in which the same rule was applied are *Wood* v. *White* [1], *Chadwick* v. *Maden* [2] and *West Midland Railway* v. *Nixen* [3]. We have not been referred to any authority to show that these authorities are no longer applicable under the existing rules of procedure, or in support of the proposition that it is permissible to bring suits against persons against whom there is cause of action at the date of suit. On the other hand the judgment of Lord Parker in *Mildred Howard* v. *William Miller* [4] seems to be in accordance with the view I have taken.

As regards *The Bishop of Winchester* v. *Mid-Hants Railway Company* [5] which was cited before us, that was a suit by an unpaid vendor to obtain specific performance by payment and to enforce his vendor's lien by obtaining possession of the property and by sale if necessary and for a receiver; and it was held that the London and South Western Railway who were in possession as lessees from the defendants' were properly joined as their possession would be affected by the decree sought for. In that case, the plaintiff claimed as on the date of suit to be entitled to recover possession both against his vendees and their lessees by reason of his vendor's lien. They were necessary parties to the suit only in so far as it included a claim to enforce the lien, a necessity which is clearly explained by Lord Romilly in *Attorney General* v. *Sittingbourne and Sheerness Railway Co.* [6].

As to S. 27 of the Specific Relief Act, that section merely provides against what persons contracts may be specifically enforced. They include not only (*a*) the parties to the contract and (*b*) parties claiming under them by title subsequent other than transferees for value and without notice but also (*c*) "any person claiming under a title which though prior to the contract and known to the plaintiff might have been displaced by the defendant. As an illustration of specific performance being enforced in this way against a person claiming under a title prior to the contract, we are given the case of two joint tenants each of whom owns an undivided moiety which he may alienate during his life time but which in default of alienation

1. (1839) 4 My. and Cr. 460.
2. (1851) 9 Ha. 188.=68E. R. 469.
3. (1863) 1 H. and N. 176.
4. (1915) A. C. 318 at p. 323.
5. (1867) L. R. 5 Eq. Cas. 17.
6. (1886) L. R. 1 Eq. 636.

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devolves on the survivor. All that the illustration shows is that, if one of the joint tenants contracts, as he is entitled to do, to sell his share and dies before performing his contract, specific performance of that contract may be enforced against the other joint tenant. The section and the illustration, in my opinion, have no bearing on the question before us, which is whether persons who are strangers to the contract and against whom it cannot be specifically enforced can be properly joined as defendants and partition claimed against them as co-parceners of the vendor.

As regards the first question, I agree with the opinion of Srinivasa Aiyangar, J. which I have had the advantage of reading.

Abdur Rahim, J.

Abdur Rahim, J :—The questions referred depend, in my opinion, for their answer on the provisions of Order I, of the Civil Procedure Code, and S. 27 of the Specific Relief Act. Rule 3 of Order I, Civil Procedure Code which is directly applicable is in these words :—"All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist whether jointly, severally or in the alternative, where if separate suits were brought against such persons any common questions of law or fact would arise."

Rule 1 relates to the joinder of plaintiffs and is in identically the same words as Rule 3 with 'plaintiffs' substituted for 'defendants' and with the necessary alterations to suit the case of plaintiffs. Comparing them with the corresponding provisions of the Code of 1882, it is clear that the legislature by replacing the words 'in respect of the same matter' of the old code with the words "in respect of or arising out of the same act or transaction or series of acts or transactions" followed by the qualifying proviso —"where if separate suits were brought against such persons any common question of law or fact would arise" has materially widened the scope of the rules relating to joinder of parties. This is evident both from the more comprehensive nature of the language of the new rules and the history of the legislation on the subject.

The new words are taken from Rule 1, Order XVI of the Rules of the Supreme Court of 1896 where they were introduced because of the decision of the House of Lords in *Smurthwaite* v. *Hannay* [1], holding, in reversal of the judgments of Esher, M. R.

1. (1894) A. C. 494

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and Kay, L. J in the Court of Appeal, that the rule related only to joinder of parties in respect of the same cause of action and not to joinder of causes of action. This was exactly S. 26 of the Indian Code of 1882 which contained the very words "in respect of the same cause of action." The amended Rule 1 of the Supreme Court Rules of 1896 was evidently intended to carry out the view expressed by Lord Esher, M. R. that if in a case like *Smurthwaite* v. *Hannay* [1] where "the different causes of action and claims all arise out of the same transaction" more than one plaintiff, was not allowed to join, it would be lamentable waste of time and money. In fact the English Rule Committee and following them, the Indian legislature went further in permitting such joinder, not merely with respect to right to relief arising out of the same transaction but a series of transactions.

In England while rule 1 was amended rule 4 which dealt with the question of joinder of defendants was allowed to remain as it was before 1896. Nevertheless the Court of Appeal in *Compania Sansinena De Carnes Congeladas* v. *Houlder Brothers and Co., Limited* [2] holding that the alteration of Rule I made it clear that Order XVI did not deal solely with joinder of parties and that Rule 4 must be interpreted in the light of Rule 1, laid down that the power to join several defendants in the same action extended to cases where the subject-matter of complaint as against the several defendants is substantially the same although the causes of action against them respectively are technically different in form, and the several liabilities alleged against them respectively are to some extent based on different grounds. The Indian legislature however provided against all difficulties of interpretation by enacting Rule 3 in the same words as Rule 1. By S. 28 of the old Code the right to relief was required to be 'in the same matter', under Rule 3, it is sufficient if such right exists 'in respect of or *arises out of* the same transaction or series of transactions subject only to the condition that there be any common question of law or fact to be decided'. It does not matter whether there are more than one and technically different causes of action *Compania Sansinena De Carnes Congeladas* v. *Houlder Brothers and Co.,Ltd.*, [2] or the liabilities of the several defendants are different, Rule 4 (b); nor is it necessary that every defendant should be interested in all the reliefs claimed in the suit (Rule 5.)

1. (1894) A. C. 494. 2. (1910) 2 K. B. 354.

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But it is argued that these rules do not affect the question whether to a suit for specific performance strangers to a contract may be joined as defendants and it is contended that it is governed by the rule laid down by Lord Cottenham in *Tasker* v. *Small.*[1]

It is perfectly clear however that even in England where the general rule still is that the parties to the contract are not necessary and sufficient parties to the action as held in *Tasker* v. *Small*[1] there are many real or apparent exceptions to this rule which is after all a rule of convenience and good sense (see Fry's Specific Performance, S. 176 and Section 192). Some of the exceptions were recognised under the former practice of the Court of Chancery itself while the rules of the Supreme Court have largely enlarged the powers of the Court in joining any party whose presence may be necessary (see Halsbury, Vol. 27, notes to S. 141, page 79 and Fry, S. 192,). It has thus been held in England that persons claiming adversely might be made defendants, a person who by virtue of an antecedent contract with the vendor claimed an interest in the purchase money was a proper party to a suit for specific performance, in the case of purchases from a voluntary settlor, when the contract was sought to be enforced by a purchaser not only the vendor but the trustees of the settlement and the persons beneficially interested under it were properly made defendants, and in some cases where a portion of the relief claimed might affect the person in actual possession of the property that person may properly be made a party to an action for specific performance of the contract. (See the summary of cases in Fry, S. 175, 180, 181, 185, 187, 188, 189, 192 and 210, and 27, Halsbury, S. 141, and notes thereto.) *Bishop of Winchester* v. *Mid-Hants Railway Company*[2] was a case of the last class where Stuart, V. C. held "Ordinarily a person not being a party to the contract ought not to be brought before the Court. But it is otherwise where possession is sought by the bill, and the person in possession will be affected by the decree."

That in a suit to enforce specific performance of a contract for the sale of immoveable property possession can also be asked for and obtained as against the vendor is well established by the rulings of this Court as well as of the other Indian High Courts. See *Bugata Appala Naidu* v. *Chengalvala Jogiraju*[3] where the

1. (1887) My and Cr., 63. 2. (1867) L. R. 5 Eq. Cas. 17
3. (1916) I. M. W. N. 77.

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learned Chief Justice and Seshagiri Aiyar, J. say, "It is the practice in this and other courts to allow a claim for possession to be included in a claim for specific performance of a contract for the sale of immoveable property and we are not prepared to question it." And it was not argued before us that as against the vendor himself partition could not be obtained in such a suit although delivery of possession might be, at any rate any such distinction would be altogether untenable. That a buyer of a Hindu co-parcener's share cannot ask for joint possession but only for partition cannot surely make his position any worse.

The real ground on which objection to the joinder in this case, of defendants 2 to 5 who are the co-parceners of the 1st defendant who contracted to sell his share in certain items of the family property to the plaintiff, is based is that the right to partition does not arise until after the conveyance has been executed under the decree of the Court. This objection, it may be pointed out, primarily raises the question as to what reliefs can be obtained along with specific performance and relates to the joinder of defendants only inferentially. I do not see why we must say that the right to ask both for specific performance and for possession did not arise at the time when the vendor refused to carry out the bargain and give the vendee possession of the property.

I may observe however that it does not follow that because in a suit for specific performance the plaintiff does not ask for delivery of possession, Order II, Rule 2 of the Code of Civil Procedure would be a bar to a future suit for possession. For ordinarily the vendor is either not interested in denying or cannot deny the plaintiff's right to obtain delivery of possession of the property if the latter has a right to enforce the contract and the question therefore of the purchaser's right to possession is seldom raised at a time when the very contract of sale or the plaintiff's right to enforce it is still in dispute.

That by virtue of S. 54, Transfer of Property Act, no interest in immoveable property is created by the contract of sale itself does not at all affect the question. It is sufficient for the plaintiff to say that by the contract he obtained the right to acquire the property with the aid of the Court, the execution of a Registered instrument and delivery of possession being the means by which the right is to be enforced. The decision of the Privy Council in

Venkayyamma Rao v. *Appa Rao* [1] is based on this principle. I think it would be unreasonable to hold that the right to possession *does not arise out of* the contract as to be covered by the words of rule 3 (see *Madan Mohun Singh* v. *Gaja Prasad Singh* [2].

Nor can it make any difference that the right to one relief, that is, possession, is contingent on the plaintiff establishing his right to another relief, namely, execution of a proper conveyance by the defendant. There are many other examples of such suits, *e. g.*, suits for establishing right to and to recover immoveable property and for mesne profits, for setting side alienation on ground of fraud or undue influence and other cases of that description.

I am also of opinion that S. 27 clause (c of the Specific Relief Act applies as illustrated by the two examples appended to it, especially the 2nd case which is as follows; " A and B are joint tenants of land, his undivided moiety of which either may be alien in his lifetime, but which, subject to that right, devolves on the survivor. A contracts to sell his moiety to C, and dies. C may enforce specific performance of the contract against B." This illustration which is undoubtedly covered by the terms of the section is substantially the present case and shows that a purchaser from a coparcener can enforce specific performance of his contract against the other coparceners. That being so the only question is whether the joinder of prayer for possession or partition is permissible, and I have already tried to show that it is.

As for the suggestion that the joinder of parties other than the vendor as contemplated by S. 27 is for the purpose of compelling them to join in the conveyance, it is not necessary to express any opinion upon it on this reference. All that I wish to say on that point as it is raised in Sadasiva Aiyar, J's judgment, is that in some cases it may be necessary to order persons other than the vendor to join in the execution of the deed of sale. And that, I may observe, was the kind of question that was really mooted in *Tasker* v. *Small* [3] and the other English decisions of the category. In *Mildred Howard* v. *William Miller* [4] also, all that was decided was that no decree for specific performance could be given against a person who was not a party to the

1. (1916) I.L.R. 39 Mad. 509.
2. (1912) 14 C.L.J. 159 at p. 162.
3. (1837) 3 My. and Cr., 63.
4. (1915) A. C. 315 at 318.

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agreement. Anyhow, I fail to see that because defendants 2 to 5 might or might not be asked to join in the conveyance, it follows in any way that partition might not be obtained as against them in the same suit.

It is obvious that to require the purchaser first to enforce specific performance of the contract of sale and after he has obtained a decree to that effect, to institute a separate suit for partition, would be a wholly unnecessary multiplication of suits resulting in a mere waste of time and money. In some cases, where, for instance, a coparcener or tenant-in-common who had been excluded from his share sold to a *bona fide* purchaser shortly before the lapse of the period of limitation, the purchaser might lose the whole bargain through no fault of his own. As, in my opinion, the terms of Order I of the Code of Civil Procedure and S. 27 of the Specific Relief Act, negative such a narrow construction and there is nothing in reason or principle to warrant it, I would answer both the questions in the affirmative. There is no decision exactly in point, but in so far as the case in *Bugata Appala Naidu* v. *Chengalvala Jogiraju* [1] and S. A. Nos. 443 of 1915 may be regarded as laying down any general rule that in a suit for specific performance, a person in possession other than the vendor cannot be joined as a defendant, I should hold with the greatest deference to the learned Judges concerned in those decisions, that such a general proposition is not sustainable. It is mainly based on the observations of Lord Cottenham in *Tasker* v. *Small* without sufficient regard being had to the subsequent relaxations of the old rule in later decisions of the English courts and the changes effected in the rules of the Supreme Court of England.

If the Court thinks that the claims against several defendants should be separately tried in any cases covered by Rules 3, 4 and 5 of Order 1 on grounds of convenience, it has ample power to order separate trials and it is the obvious intention of the legislature as is to be collected from the provisions of Order 1, that subject to this power, all claims arising out of the same transaction or series of transactions shall be tried together if they are so connected as to give rise to any common question of fact or law.

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1. (1916) 1 M. W. N. 77.

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It may be pointed out that in this particular case the further allegations that the 1st defendant fraudulently compromised the previous suit for partition instituted by his coparceners (defendants 2 to 5) in order to deprive the plaintiffs of the fruits of their purchase and that the defendants 2 to 5 have been acting in collusion with him with knowledge of the contract of sale, make defendants 2 to 5 necessary parties to the action.

For these reasons, I agree with the conclusion of Oldfield, J.

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J:—As I agree generally with the Judgment of Sadasiva Aiyar, J., I do not propose to discuss the question at length. The answer to the questions referred to us appears to me to depend upon well settled principles. To a suit for specific performance of a contract the parties to the contract or their representatives are necessary parties, others bound to perform it are proper parties, and no others can be made parties. *Mildred Howard* v. *William Miller* [1]. S. 27 of the Specific Relief Act specifies the persons against whom contracts can be specifically enforced. As a part of this rule all persons who may be affected by the enforcement of the rights of the plaintiff arising out of the contract may properly be made parties; as for example in *Bishop of Winchester* v. *Mid-Hants Railway Company* [2], which was a vendor's suit for specific performance, where the plaintiff sought relief by way of declaration of lien for unpaid purchase money and enforcement of that lien by the appointment of a receiver, and injunction the purchaser's lessees were held proper parties. It is also settled that in a suit by the buyer for specific performance of a contract of sale of immovable property, the plaintiff is entitled not merely to call for a conveyance from the vendor, but also seek possession of the property from the vendor, by compelling him to perform all his obligations under the contract of sale, namely, to give the buyer such possession of the property as its nature admits. Ordinarily and in the absence of a contract to the contrary the buyer would be entitled to possession at the time fixed for completion of the sale and if he accepts the title and offers to pay the purchase money he would be entitled both to call for a conveyance and to possession of the property from the vendor; and in a suit for specific performance the buyer may be entitled to damages in addition to specific performance for the failure of the vendor to give

1. (1915) A. C. 315 at p. 323. 2. (1867) L. R. 5 Eq. Cas. 17.

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possess at the time agreed. (*See* illustration of the third paragraph in S. 19 of the Specific Relief Act. *Royal Bristol Permanent Building Society* v. *Bomash* [1]. This right of the buyer, I apprehend, is a right *in personam* against the vendor and arises out of the contract for sale and is different from the title or the right of property which the purchaser obtains on the execution of the conveyance which enables him to sue in ejectment all persons in possession including his own vendor. If this is the correct view, the fact that a buyer when suing for specific performance of a contract of sale does not seek recovery of possession would not prevent him from seeking that relief on his title which gives him another cause of action. My only doubt is whether the obligation under the contract of sale to give possession is one which is capable of being specifically enforced, and whether the proper relief is not damages for breach of the contract to give possession till execution of the conveyance, after which date the purchaser would be entitled to mesne profits from the person in possession whether such person is the vendor or a stranger without title. Whether a suit for possession based on the obligation under the contract of sale can be brought against a subsequent purchaser with notice of the contract who has obtained possession as such purchaser need not be considered now. In *Fateh Chand* v. *Narasing Das* [2] it was held and in *Gaffur* v. *Bhikaji* [3] it was assumed that it can be.

In the present suit the contract of sale was to sell the 1st defendant's share in certain items of immoveable property which formed part of the co-parcenery property belonging in common to himself and the other defendants in the case. It is now settled so far as this Court is concerned that this contract, even if completed by a conveyance, would not entitle the plaintiff to joint possession with the other coparceners—that in fact he is not entitled to any sort of possession—but that his purchase if completed would enable him to bring a suit for partition in which if the Court making a division considers it fair having due regard to the rights of other coparceners to allot the property sold to the vendor, the vendee standing in his shoes may obtain that property. It is obvious that the 1st defendant, the vendor was

1. (1887) L. R. 35 Ch. Dn. 390. 2. (1915) 22 C. L. J. 383.
3. (1901) I L. R. 26 Bom. 159.

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under no obligation to place the plaintiff in joint possession of any family property and no other person even if bound to perform the obligation of the contract can be under that obligation.

It was said that in the case of a contract to sell his share of the joint family property by a member of the coparcenery, there is a contractual obligation on his part to divide himself off from the other members and place the vendee in possession of the property which may be allotted in a fair partition. Without an express stipulation in the contract, I am unable to imply any such obligation from the provisions of the Transfer of Property Act or any other law governing the relation of vendor and vendee. Even in the case of tenants-in-common, where one tenant in common sells his share in specific items there appears to be no such obligation. (See Freeman on Co-tenancy, S. 199 at page 329).

The right to sue for partition does not arise till after the legal title is transferred and when the suit was instituted in the present case there was no right to sue for partition at all. This conclusion apart from any question of joinder of parties or causes of action, which can only arise if there is a right to relief against one or more of the defendants at the time of the institution of the suit, is enough to answer the second question in the negative. (See *De Hoghton* v. *Money* [1], especially the observations at page 170 of the report).

The first question stands on a different footing; and an answer to that would depend on, whether defendants 2 to 5 are subsequent transferees of the property agreed to be sold to the plaintiff. The compromise in the previous litigation which is challenged in the present suit as a fraud on the rights of the plaintiff under his contract of sale, does not in terms purport to be a transfer of the 1st defendant's share of the property agreed to be sold to the plaintiff; he as a member of a Mitakshara Joint Hindu family had no definite share in any particular item of the family property. In fact what defendants 2 to 5 say is that they have only converted their partial interest in the whole of the family properties, into a full interest in some of them, and that no agreement by the 1st defendant can affect their prior rights in the family property.

1. (1866) L. R. 2 Ch. 164.

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They in no way dispute the contract of the 1st defendant with the plaintiff. It is not said that the value of the property allotted to the 1st defendant is less than the value of his share.

But a partition involves the release of the interest of the other coparceners in the properties allotted to one of them and though by virtue of their prior title defendants 2 to 5 may be entitled to a release from the 1st defendant of his interest in the properties the subject of the present suit, if these properties were allotted to them in fair partition without their being affected by the contract of sale which can only operate subject to their rights, yet if the partition is proved to be a fraudulent design to defeat the rights of the plaintiff under his contract of sale, by the 1st defendant giving up the chance of the suit properties or a share in them being allotted to him in a fair division, I think that defendants 2 to 5 in such a case may fairly be treated as subsequent transferee's notice. In *Fatechand* v. *Narasing Das* [1], which is perhaps the nearest to the present case, under the form of a compromise one of the defendants got a transfer for money of whatever interest the other defendant had in the property agreed to be sold. It was held that he was a subsequent transferee. The difference between that case and this is obvious; but that, I think, makes no difference in principle. The answer to the 1st question must therefore be in the affirmative.

In the view I have taken, there is only one cause of action, namely, that for specific performance in this case, the other cause of action, *viz.*, for partition not having accrued on the date of the suit. If there was an existing cause of action for partition on the date of the suit, the question whether the two causes of action, one for specific performance and the other for partition and possession, can be joined in one suit, would depend not only on the provisions Order 1, Rules 3 and 5 which primarily regulate the joinder of parties but also of Order II, Rules 3 and 4 which provide for joinder of causes of action.

C. A S.

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1. (1915) 22 C. L. J. 383.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

Present:—Sir John Wallis, Chief Justice, Mr. Justice Abdur Rahim, and Mr. Justice Srinivasa Aiyangar.

Boidyo Gauranga Sahu ... *Appellant** (*Defendant*).

v.

Sudevi Mata ... *Respondent* (*Plaintiff*).

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Boidyo Gauranga Sahu *v.* Sudevi Mata.

Hindu Law—Religious Endowment—Extinction of line of trustees designated by founder—Founder's heirs, right of, to create a new line of trustees.

Per Chief Justice and Abdur Rahim, J. (*Srinivasa Iyengar, J.* dissenting):

Under the Hindu Law, it is competent to the heirs of the founder of a religious endowment to create a fresh line of trustees on failure of the original line of trustee prescribed by the founder himself.

Authorities on the point, reviewed.

Facts: The facts of the case appear in the Order of Reference to a full Bench.

Second Appeals against the decrees of the Court of the Temporary Subordinate Judge of Ganjam at Berhampore in Appeal Suits No. 32 and 19 of 1913, preferred against the Decrees of the Court of the Principal District Munsif of Berhampore in Original Suits No. 412 and 455 of 1911 respectively.

These Second Appeals came on for hearing on Wednesday and Monday, the 20th and 25th days of September 1916.

The Court (Seshagiri Aiyar and Srinivasa Aiyangar, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH:

The facts found are these: The grand-father and the father of the plaintiff, Bavuri and Brúndavan, acquired certain properties on Darkast and dedicated them to a shrine which they consecrated in or about the year 1887. The plaintiff was admittedly born during the life-time of the grand-father. When the shrine was established, one Gangadhara Doss Bavaji was appointed to perform the pooja in the shrine. The grand-father died about 1893. The father made his will in 1908. He has therein prescribed the course of devolution regarding the trusteeship of the shrine. The plaintiff questions the validity of the disposition in the will.

Before dealing with the main question argued in the case, we might dispose of the minor contentions. Mr. Krishnaswami Aiyar's contention that under the will, the plaintiff is the trustee,

* S. A. Nos. 1643 and 1644 of 1914. 16th January, 1917.

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is opposed to the plain language of the document. It is clear that the testator intended Sudevi Mata and her disciples to be the trustees. Mr. Ramesam's contention that the dedication was not complete during the life-time of the father cannot be accepted. We think the finding of the Subordinate Judge, "that Bavuri and Brundavan (the grand-father and the father) were joint founders of the mutt," is supported by evidence. The dedication must be taken to have been completed in the grand-father's life-time.

The main contention related to the powers of the father to prescribe the course of devolution for the management of the trust. It was contended that as the Pujari trustee appointed originally died, the right of nomination reverted to the joint founders and their heirs and that it was open to Brundavan to have created a line of trustees. In the first place, if this right is exercisable by the heirs, the father alone is not competent to exercise the right, as the son was admittedly alive at the time. But the more serious question is, whether the right of nomination accrues to the heirs of the founders.

Under English Law, there can be no question that after dedication, the founder or his heirs would have no right to be or to appoint trustees. Is the law different in India? It was held in *Mussamat Jai Bansi Kunwar* v. *Chattar Dhar Sing* [1], that where the line of trustees had become extinct, the trusteeship would vest in the founder's family. No usage is referred to in the judgment, nor is any text of Hindu Law quoted in support of this position. However, this view has been regarded as unassailable by a long course of decisions. The Judicial Committee of the Privy Council have recognised the soundness of this rule. *Gossamee Sree Greedharreejee* v. *Rumanlolljee Gossamee* [2], *Maharaja Jagadindra Nath Roy Bahadur* v. *Rani Hemanta Kumari Debi* [3] and *Mohan Lalji* v. *Gordhan Lalji Maharaj* [4]. In none of the cases before the Privy Council, was there any suggestion that the right of nomination would vest in the founder's heirs. But the Allahabad High Court in *Sheoratan Kunwari* v. *Ram Pargash* [5], and *Sheo Prasad* v. *Aya Ram* [6], have laid down that proposition, on the basis of the ruling of the Privy Council in *Gossamee Sree Greedharreejee* v. *Rumanlolljee Gossamee* [2].

1. (1870) 5 Beng. L. R 181.
2. (1889) L. R. 16 I. A. 137: 17 C. 3.
3. (1904) L. R 31 I. A. 203
4. (1913) L. R. 40 I. A. 97.
5. (1896) I. L R. 18 A. 227.
6. (1907) I L. R. 29 A. 663.

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In Calcutta, the exact question did not arise for decision. But in *Sital Das Babaji* v. *Protap Chandra Sarma* [1] Mr. Justice Mookerjee apparently regarded the right of nomination as appurtenant to the right of management. There are some observations in *Raj Krishna Dey* v. *Bipin Behari Dey* [2], to the same effect.

In Madras, until very recently, there has been no definite pronouncement on the question. In *Sathappayyar* v. *Periasami* [3] Mr. Justice Muttusami Ayyar had to deal with the right of appointing to office of trustee claimed by the Zamindars of Sivaganga. The learned Judge whose knowledge of these questions was unique held that the founders had only the right to offer suggestions for filling up the vacancy and that the power of appointment was in the Civil Courts. As some doubt was felt regarding this position, we sent for the decree in the suit and we are satisfied that under the decree, the only right reserved to the founder's family was to offer advice. When we remember that the learned Judge had to consider elaborately the right of advice as opposed to the right of appointment in the Tiruppanandal Mutt case reported in *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran* [4], it is clear that he advisedly held in *Sathappayyar* v. *Periasami* [3], that the founder had not the right of appointment. Reference may be made to another case decided in this Court. In *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami* [5] Bhashyam Ayyangar, J., enumerates the classes of persons who would have the right of appointing in case there is a vacancy. The founder and his heirs are not among those mentioned. More recently, the learned Chief Justice and Coutts Trotter, J., have held that the reverter of trusteeship carries with it the right of appointment. With all deference, we are of opinion that this position requires reconsideration.

By the Indian Trusts Act, S. 73, the power to appoint new trustees is reserved to "the author of the trust, if he be alive and competent to contract." The heirs of the author of the trust are not among those to whom the power of appointment is given. The vesting of the power in the author of the trust is in itself a departure from the rule of English law. The exercise of the power by the founder's heirs will lead to difficulties. Is

1. (1909) 11 C. L. J. 2.
2. (1912) I.L.R. 40 C. 251 at p. 257.
3. (1890) I. L. R. 14 M. 1.
4. (1886) I. L. R. 10 M. 375.
5. (1904) I. L. R. 27 M. 435 at p. 457.

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the right to be exercised by all the members, or at a family council or by the senior in age for the time being? If the manager exercises the function and dies, are his brothers or the direct lineal heirs to possess that right? The introduction of the principle of primogeniture in such case was vetoed in *Sethurama Swamiar* v. *Meruswamiar* [1].

A further question would be whether the right of appointment is a species of property. We must take it that the right of trusteeship is property. Can the same be said of the power of appointment?

We think that in the interests of the trust itself, the safer rule will be to leave the power of appointment in courts and not to vest them in the founder's family. Both reason and convenience are in favour of this position. But having regard to the recent decision already referred to, we think it desirable to refer the following question for the decision of a Full Bench.

"Whether it is competent to an heir of the founder in whom the trusteeship has vested owing to the failure of the line of the original trustees, to create a new line of trustees?"

[These Second appeals came on for hearing in pursuance of the above order of reference to the Full Bench, on Tuesday and Wednesday the 28th and 29th days of November 1916.]

A. Krishnaswami Iyer for appellant. Unless the power to appoint new trustees is expressly reserved to the founder and his heirs at the time of the foundation, neither the founder nor his heirs have any right to appoint new trustees or create a new line of trustees on failure of the original line of trustees. See Mayne's Hindu Law, 8th Edition, p. 602, *Teertaruppa* v. *Soondarajien* [2], *Lutchmee* v. *Rookmanee* [3]. There is no text of Hindu Law supporting the contrary position. Where a founder does not appoint another person to manage the trust at the time of the dedication the presumption is that the management vests in him during his life and passes to his heirs by inheritance. But where the founder has divested himself of the trusteeship, there is no reason why the right of management must revert to his heirs. Under the English Law the founder or his heirs would have no right to the trusteeship or to appoint fresh trustees on the extinction of the line of the original trustees, in the

1. (1909) I. L. R. 34 M. 470. 2. (1851) M. S. D. A. 57.
3. (1857) M S. D. A 152.

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absence of a specific provision to that effect in the deed of endowment. The same principle should apply here also. No doubt S. 73 empowers the author of the trust to appoint new trustees. This privilege does not extend to his heirs. There is no clear authority on the point except a few Allahabad and Calcutta cases. These decisions purport to rest on the authority of the decision of the Privy Council in *Gossami Sri Gridharije* v. *Romanlalji Gossami* [1]. In that case the Privy Council dealt only with the right of management. There is a marked distinction between the right of trusteeship or management and the right of *appointing* trustees. This latter power has to be given by the deed of endowment or by Statute. This fundamental distinction has been overlooked by the Allahabad and Calcutta decisions. Reference was made to *Peet Kunwar* v. *Chuttur* [2], *Surendra Keshul Roy* v. *Doorgasoondery* [3], *Jagindra Nath Roy* v. *Hemanta Kumari Debi* [4], *Mohan Lalji* v. *Gordhan Lalji Maharaj* [5], *Janoki Debi* v. *Gopal Chandra Acharjia Goswami* [6], *Ranjit Singh* v. *Jagannath Prosad Gupta* [7], *Jagannath Prasad Gupta* v. *Runjit Singh* [8], *Sital Das Babaji* v. *Protap Chandra Sarma* [9], *Raj Krishna Dey* v. *Bipin Behari Dey* [10], *Sheoratan Kunwari* v. *Ram Pargash* [11], *Chandranath Chakrabarti* v. *Jadabendra Chakrabarti* [12], *Sheo Prasad* v. *Aya Ram* [13]. From *Sattappayyar* v. *Periasami* [14] it is clear that the founder's heirs had only the right to offer advice on being consulted.

[*Chief Justice.*—The decree of the High Court gives the plaintiff the right to appoint with the concurrence of the members of the family. That is a recognition of the right of appointment.]

In *Vidyapurna Thirtha Swami* v. *Vydyanithi Thirtha Swami* [15] the founders or his heirs do not find a place in the list of persons empowered to fill up a vacancy.

[*Chief Justice.*—The list does not profess to be exhaustive and the omission is not of much significance.]

An appointment of new trustees by the existing trustee is a transfer of the trusteeship. Consequently the founder's heirs to

1. (1889) I. L. R. 17 C. 3, 20.
2. (1870) 5 B. L. R. 181.
3. (1891) I.L.R. 19 C. 513, 531, 532.
4. (1904) I.L.R. 32 C. 129, 138, 139.
5. (1913) I. L. R. 35 A 283, 288.
6. (1882) I. L. R. 9 C. 766, 771.
7. (1885) I. L. R. 12 C. 375, 380.
8. (1897) I. L. R. 25 C. 354.
9. (1909) 11 C. L. J. 2, 12.
10. (1912) I. L. R. 40 C. 251, 257.
11. (1896) I. L. R. 18 A. 227, 232.
12. (1906) I. L. R. 28 A 689.
13. (1907) I. L. R. 29 A. 663, 666.
14. (1890) I. L. R. 14 M. 1.
15. (1904) I. L. R. 27 M. 435, 457.

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whom the trusteeship reverts cannot appoint fresh trustees. *Rajah Vurmah Valia* v. *Ravi Vurmah Kunhi Kutty* [1], *Pydigantam Jagannnadha Row* v. *Rama Doss Patnaik* [2], *Narayanan Chettiar* v. *Lakshmanan Chettiar* [3], *Suppa Bhattar* v. *Suppa Sokkaya Bhattar* [4], *Venkatasubbamma* v. *Venkatarangam Chetty* [5].

The contrary view will lead to serious difficulties. Who is to exercise the power of appointment—the manager of a joint Hindu family or all the members? If the widow is the heir of the founder, has she a right to appoint absolutely or for her life? As pointed out in the order of reference, the balance of convenience lies in leaving the power of appointing fresh trustees in a case like this, in the hands of the Court.

S. K. Parthasarthy Iyengar for *V. Ramesam*: The right of a founder and his heirs to the trusteeship in a case like the present has been recognised in India. Ss. 9 and 10 of Madras Regulation VII of 1817 and S. 73 of the Trusts Act. The founder or his heirs are more like a trustee with a power of appointment than a bare trustee. *Gossami Sri Gridhariji* v. *Roman Lalji Gossami* [6] lays down that a founder can dispose of the trusteeship during his life time. He is a trustee with the right of disposing of it by exercising the power of appointment. The estate which vests in him is an estate with a condition subsequent—and liable to be divested by the exercise of the power. *Duke of Northumberland* v. *Commissioners of Inland Revenue* [7]. The fact that the trusteeship is hereditary makes no difference. Even the heirs of the founder take subject to this condition. The decision in *Sattappayyan* v. *Periasami* [8], clearly supports my contention. Besides the cases cited by the other side, there are others in my favour. *Gobind Prasad* v. *Gomti* [9], *Baldeo Das* v. *Gobind Das* [10], *Sukbir Singh* v. *Nihal Singh* [11], *Doraisami Pillai* v. *Sandanathammal* [12]. The reasoning of these decisions is that the founder's heirs stand in a peculiar position. They are not mere trustees, but possess like the founder himself, the power of appointing trustees and divesting themselves of the management. There is no reported case which decides contra. The Sudder

1. (1876) I. L. R. 1 M. 235.
2. (1904) I. L. R. 28 M. 197.
3. (1915) 28 M. L. J. 571, 573.
4. (1915) 29 M. L. J. 558.
5. (1916) 31 M. L. J. 280.
6. (1889) I. L. R. 17 C. 3.
7. (1911) 2 K. B. 343, 354.
8. (1890) I. L. R. 14 M. 1.
9. (1908) I. L. R 30 A. 288.
10. (1914) I. L. R. 36 A 161.
11. (1913) 18 I. C. 232.
12. (1915) M. W. N. 478.

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Decisions cited by the other side and referred to in Mayne, p. 602 turn on facts peculiar to themselves and do not lay down any rule of general applicability.

A. Krishnaswami Iyer replied.

The Court expressed the following

Wallis, C. J.

Opinion :—*The Chief Justice.*—The institution of the hereditary office of trustee of religious and charitable endowments is in accordance with the custom of the country recognized in Madras Reg. VII of 1817 and Act XX of 1863 and is too firmly established to be altered without legislation. It affords however no guarantee of fitness for the exercise of the office and may be held largely responsible for the numerous cases of waste and misappropriation of these endowments which come before the Court, and, it is to be feared, for a still larger number which are never brought before it. The exercise and enjoyment of the office in the event of the successive partitions to which families in India are liable also present difficulties which are illustrated by *Ramanathan Chetty* v. *Murugappa Chetty* [1] which was affirmed by the Privy Council in *Ramanathan Chetti* v. *Murugappa Chetti.* [2] In these circumstances it would perhaps be better if it had never been held that on failure of the line of devolution prescribed by the founder the trusteeship reverted as an hereditary office to the heirs of the founder. But, as observed in the order of reference, this view has been regarded as unassailable by a long course of decisions, and I do not feel at liberty to differ from them. This being so, there is, I think, much to be said for the view of the Allahabad and Calcutta Courts recognizing the right of the founder's heirs to make fresh arrangements for the devolution of the trust instead of leaving it to devolve as otherwise it must in the family of the founder subject to the difficulties as to its exercise and enjoyment to which I have already alluded. The institution of hereditary trusteeship is held to rest on the intention of the donor either expressed in the instrument of trust or to be presumed from usage, and the doctrine of reverter to the heirs of the donor on failure of the line of devolution prescribed by him must also it seems to me rest on his presumed intention. This being so I do not see much difficulty in presuming an intention that the heirs should be at liberty to make fresh arrangements for the devolution of the trust instead of leaving it to devolve in the

1. (1903) I. L. R. 27 M. 192. 2. (1906) I. L. R. 29 M. 283. (P. C.)

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family a result which the founder had shown himself anxious to avoid. In *Ramanathan Chetty* v. *Murugappa Chetty* [1], Benson and Bhashyam Ayyangar, JJ., were of opinion, that, when the office of trustee devolved upon the members of a Hindu family, it was open to them to settle a scheme for the enjoyment and exercise of the office in rotation, and their decision was upheld in *Ramanathan Chetty* v. *Murugappa Chetty* [2], by their Lordships of the Judicial Committee who held that the arrangement was one which the parties interested were competent to make without applying to the Court. That no doubt was not a case in which the trusteeship had reverted to the heirs of the founder on failure of the line prescribed by him. But in such an event also it seems to me more convenient and more in accordance with the presumed intention of the founder to allow fresh arrangements to be made instead of leaving the office to devolve on the heirs. It might I agree be still better if it were open to us in such a case to exclude the heirs of the founder altogether and leave a scheme to be settled by the Court. The right of nomination in such circumstances appears to have been recognised by the Court of Sudder Adalat, Mad. S. D. A. No. 52 of 1857. The decision of Muttusami Aiyyar, J., in *Sathappayyar* v. *Periasami* [3], does not in my opinion help either side. What the learned Judge did was to recognize a right of appointment, not in the plaintiff as heir of the founder or in the Court, but in the plaintiff and his family as the beneficiaries under the trust. At page 13 the proper decree is said to be to declare the respondent's right to appoint a person qualified to discharge the peculiar trusts as new trustee with the concurrence of the members of the family. The statement as to the decree in the order of reference was made under a mis-apprehension, as what the decree does is to declare the right of the plaintiff to nominate with the concurrence of his family and to direct the properties to be handed over to the person so nominated, and in default of nomination to dismiss the suit, and this appears to me to have given effect to the intention of the learned Judge. The other cases are sufficiently dealt with in the order of reference and the opinions of my learned brothers and it is unnecessary to refer to them. I would answer the question in the affirmative.

1. (1903) I. L. R. 27 M. 192. 2. (1906) I. L. R. 29 M. 283.
3. (1890) I. L. R. 14 M. 1.

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Abdur Rahim, J.—To my mind the question whether the right of nominating a trustee to a Hindu religious endowment vests in the heirs of the founder in the absence or failure of a specific provision in the deed of endowment or where there are no special usages or circumstances indicating a different mode of devolution, is concluded by authority and must be answered in the affirmative. It is not suggested that there is any text of Hindu Law bearing on the point, but the question has been the subject of unanimous rulings of this Court as well as the Allahabad and Calcutta High Courts, the later decisions being mainly founded on the pronouncement of the Judicial Committee in *Gossami Sri Gridhariji* v. *Romanlalji Gossami* [1].

To begin with the earlier cases. Of the two Madras Sudder Dewany decisions cited by Mr. Mayne in his Hindu Law (paragraph 440) as negativing the right of nomination by the heirs of the founder, all that was decided in Case No. 50 of 1851, page 57 was that the heirs of a founder were not entitled to recover possession of the endowed properties from a trustee who had been properly appointed or to demand accounts from him. The statement that "it is obvious that in the management of charitable institutions, the heirs of the founder can have no legal right to interfere unless under some special powers given to them by the founder" should not be given a wider application. Case No. 52 of 1857 (at page 152) clearly ruled that on the death of the first Dharmakartha appointed by the founder the latter's heir had the right to appoint a fresh trustee. In 1870 a Division Bench of the Calcutta High Court of which Dwarkanath Mitter, J. an eminent authority on Hindu Law, was a member, held in *Peet Koonwar and another* v. *Chuttur Dharee Singh*, [2] same case—*Mussamat Jai Bansi Kunwar* v. *Chuttar Dhari Sing*, [3] that where the Mutawalli of an endowment dies without nominating a successor, the management must revert to the heirs of the person who endowed the property. The endowment in question in that case, it may be mentioned, was made by a Hindu for an idol though the words Mutawalli and waqfae (Mahomedan Law terms for trustee and deed of endowment respectively) were used in connection with the dedication.

The principle of the decision in *Peet Koonwar and another* v. *Chuttur Dharee Singh*[2], was affirmed by the Judicial Committee

1. (1889) I. L. R. 17 C. 3 at page 20.
2. (1870) 13 W. R. 396.
3. (1870) 5. B. L. R. 181.

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in *Gossami Sri Gridhariji* v. *Romanlalji Gossami*, [1] where they lay down, "According to Hindu Law, where the worship of a Thakur has been founded, the Shebaitship is held to be vested in the heirs of the founder, in default of evidence that he has disposed of it otherwise, or there has been some usage, course of dealing, or some circumstances to show a different mode of devolution." It was so held also in *Surendro Keshub Roy* v. *Doorgasoondery Dossee*, [2] and the rule was re-affirmed in *Jagadindra Nath Roy* v. *Hemanta Kumari Debi*, [3] their Lordships saying that in the absence of evidence as to the terms or conditions of the foundation the legal inference is that the title to the property, or to the management and control of the property, as the case may be, follows the line of inheritance from the founder. In *Mohan Lalji* v. *Gordhan Lalji Maharaj* [4] they made it clear that the rule enunciated in *Gossami Sri Gridharji* v. *Romanlalji Gossami* [1], was subject to the condition that the devolution in the ordinary line of descent is not inconsistent with or opposed to the purpose the founder had in view in establishing the worship.

It is contended that the right of the heirs of the founder is limited to their holding the office themselves and does not include the power to nominate or appoint a trustee. No such limitation has however been recognised by the courts and I am not persuaded that it was ever within the contemplation of the Judicial Committee. Soon after the judgment of the Privy Council in the case in *Gossami Sri Gridhariji* v. *Romanlalji Gossami* [1], Muttuswami Ayyar, J., had to consider in *Sathappayyar* v. *Periasami* [5] the precise question now raised before us with reference to a mutt. He laid down at page 13, "in the absence of a qualified disciple in whom the right of succession has already vested, the beneficiaries, who are the members of the Zamindar's family, are the only persons interested in the appointment and entitled as such to express an opinion regarding the fitness of the proposed new trustee for the office. The case is then analogous to that of a vacancy arising from the death of a paradesi without appointing his successor. The proper decree is to declare the respondent's right to appoint a person qualified to discharge the peculiar trusts

1. (1889) I. L. R. 17. Cal. 3. at p. 21
2. (1891) I. L. R. 19 Cal. 513 at p. 532.
3. (1904) I. L. R. 32. Cal. 129. at p. 139. 4. (1918) I. L. R, 85. All 283.
5. (1890) I. L. R. 14 M. 13.

as new trustee with the concurrence of the rest of his family, to direct him to do so within a given time, and, upon his doing so, to confirm such appointment after notice to the other members of the respondent's family, and to direct that upon such confirmation the properties in dispute be made over to the person newly appointed to be administered so as to carry out the trusts of the institution in accordance with its usage". On referring to the decree passed in accordance with the above direction it is evident that the suggestion made in the Order of Reference that the decree drawn up by the High Court only declared the right of the heir of the founder "to offer advice" was based on a clear misapprehension. In fact that was the important point on which the decree of the Lower Court was modified by the High Court, the modification consisting in declaring the right of the Rajah to appoint or nominate the paradesi subject to confirmation by the Court.

Then, I am unable to draw from the passage in *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami* [1] alluded to in the Order of Reference any conclusion that Mr. Justice Bhashyam Ayyangar, intended to negative the right of the heirs of the founder to make nomination in the case of a vacancy. If he intended to lay that down, one would have expected him to do so in express terms especially as he was one of the vakils who argued the case before Muttuswami Ayyar, J. The learned Chief Justice and Coutts Trotter, J. in *Doraisami Pillai* v. *Sandanathamall* [2], on the other hand held that on failure of the provision originally made by the founder for management of a charitable trust, the right to provide for succession to the trust reverted to him.

In *Sheoratan Kunwari* v. *Ram Pargash*, [3] the law is taken to be well-settled that in the absence of provision for the nomination of a trustee, the right to nominate vests in the founder of the endowment and continues to his heirs and the ruling of the Privy Council in *Gossami Sri Gridhariji* v. *Romanlalji Gossami* [4]. is referred to as having accepted the principle. The rule is followed in *Chandranath Chakrabarti* v. *Jadabendra Chakarabarti* [5], *Sheo Prasad* v. *Aya Ram* [6], *Gobind Prasad* v. *Gomati* [7] and *Sukhbir Singh* v. *Nihal Singh* [8].

1. (1904) I. L. R. 27 M. 435 at 457.
2. (1915) M. W. N. 478.
3. (1896) I. L. R. 18 A 227 at p. 232.
4. (1889) I L. R. 17 Cal. 3.
5. (1906) I. L. R. 28 A. 689.
6. (1907) I L. R. 29 A. 663.
7. (1908) I. L. R. 30. A. 288.
8. (1913) 18 I. C. 232.

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That has also been the course of decisions in Calcutta. In *Ranjit Singh* v. *Jagannath Prosad Gupta* [1] it was held by Norris and Ghose, JJ. following *Peet Koonwar and another* v. *Chuttur Dharee Singh*, [2] that on failure of the provision for the appointment of a Shebait or manager, the office reverted to the heirs of the founder. Banerji, J., a very learned Hindu lawyer stated in *Jagannath Prasad Gupta* v. *Runjit Singh* [3] the rule as enunciated in *Peet Knnwar* and another v. *Chuttur Dharee Singh* [2] and *Gossami Sri Gridharjia* v. *Romanlalji Gossami* [4] in general terms to the effect that when there is no other provision for the appointment of Shebait the management of the endowment must revert to the heirs of the founder. The same view of the law is upheld by Mookerjee, J., in *Sital Das Babaji* v. *Protap Chandra Sarma* [5], and *Raj Krishna Dey* v. *Bipin Behari Dey* [6].

In the face of these authorities I feel myself bound to hold that the question referred to us is no longer an open one. Up to now there has been no expression of judicial dissent from the view of the law expressed in the above dicisions.

I may mention that Mr. A. Krishnaswami Aiyar referred us to *Narayanan Chettiar* v. *Lakshmanan Chettiar* [7], where it was held that an alienation of the office of trustee by the hereditary trustee of a temple is absolutely void. But it does not seem to me that nomination of a trustee by the heirs of the founder who on the failure of the line of trustees indicated by the deed of endowment would themselves be entitled to act as trustees is *ipso facto* the same thing as alienation of the office of a trustee by the hereditary trustee. It is no more an alienation of the office, properly speaking, than the provision for appointment of a trustee when made by the founder himself.

Nor can it be said that the nomination of a trustee by the heirs of the founder would not be in accordance with the genesis of the Hindu Law relating to trusts. That system recognises the hereditary principle with reference to trusteeships, such office is liable to partition like ordinary joint family property and it has been held to be capable of being acquired by prescription. It would doubtless be more in accordance with modern legal notions

1. (1885) I. L. R. 12 C. 375 at p. 380.
2. (1870) 13 W. R. 396.
3. I. L. R. 25 Cal. 354.
4. (1889) I. L. R. 17 C. 3.
5. (1909) 11 C. L. J. 2.
6. (1912) I. L. R. 40 C. 251.
7. (1915) 28 M. L. J. 571.

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to release the office of trustee from the domination of the joint family and hereditary principles relating to tenure of property and the arguments of convenience probably preponderate in the same direction. At the same time I am not convinced that there are really insuperable difficulties in working out the view which upholds the right of the heirs of the founder to nominate and appoint trustees. Such of them as arose in actual cases have apparently been solved.

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J.—The argument before the Full Bench in which however nothing new was said and the further consideration which I have given to this matter have in no way changed the opinion which Mr. Justice Seshagiri Aiyar and myself expressed in the referring order. It is remarkable that in support of the doctrine of reversion of the management of trusteeship to the founder or his heirs which is applicable only to charities founded by Hindus, no Hindu Law text or Commentary was cited; and in *Mussamat Jai Bansi Kunwar* v. *Chattar Dhare Sing* [1] (same case 13 W. R. 396.) [2], inwhich the doctrine was first formulated, the learned Judges do not treat it as one based on Hindu Law or Usage. They say that as one of the provisions of the trust, that which related to the management failed, and as the idol cannot manage the property, the managership must revert to the heirs of the person who endowed the property. I am unable to see why it *must*; in the absence of any person nominated for the purpose of appointing new trustees by the deed of endowment and in the absence of a statutory power, the Court will appoint a person to carry out the trusts. (Perry on Trusts S. 294.)

A Hindu who makes a gift to an idol or founds a charity does not resort to the machinery of trusts, but makes a direct gift to the charitable object which is conceived of as a juridical person; and there is no need of incorporation either. In such a case where he does not appoint another person to manage the properties so given, or settle a scheme for such management, as he is entitled to do at the time of the endowment and as a part of the same transaction, the natural presumption or the legal inference is, that he intends to manage the property himself on behalf of the charity or reserves the management to

1. (1870) 5 Eng. B. L. R. page 181.

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himself. Such management may pass to his heirs by inheritance, just as a legal estate of heritance may pass in England. That is the utmost extent to which the decisions of the Privy Council take us, though no doubt in *Gossamee Sree Greedharreejee* v. *Rumanlolljee Gossamee* [1], *Peet Koonwar* v. *Chuttur Dharee Singh* [2] was approved. It is to be observed, however, that the principle of Hindu Law—it is here for the first time it is said to be a principle of Hindu Law—which their Lordships lay down is, "that when the worship of a Thakoor has been founded the Shebaitship is held to be vested in the heirs of the founder in default of evidence that he has disposed of it otherwise or there has been some usage, course of dealing or some circumstance to shew a different mode of devolution." In a very recent case, *Mohan Lalji* v. *Gordhan Lalji Maharaj* [3], their Lordships explained that the vesting of the management in accordance with the rules of inheritance applicable to private ptoperty, "must from the very nature of the right, be subject to the condition that the devolution in the ordinary line of descent is not inconsistent with or opposed to the purpose the founder had in view in establishing the worship." It seems to me fairly clear from the above observations that whatever other rights the founders' heirs may have, they had no right of nomination ; for even if they were incompetent to perform the Sheba or worship, they were not incompetent to nominate persons qualified to perform the worship ; and their Lordships do not appear to contemplate the existence of a power of nomination at all, which power is certainly not necessarily appendant to the trusteeship or Shebaitship as is assumed in the Allahabad cases.

The only case in which the foundation of this doctrine of reversion of management or the power of nomination is examined is *Sital Das Babaji* v. *Protab Chandra Sarma* [4]. There Mookerjee, J. after stating the two propositions both of them well established, namely (1) that the devolution of the management of the trust depends upon the terms of its original constitution whether they are proved by direct evidence as for example the production of a deed of endowment, or by the proof of usage, (2) that the office of Shebait is held to be vested in the founders' heirs in default of evidence that he has disposed of it other-

1. (1889) 16 I. A. p. 137. 2. (1870) 13 W. R. 396.
3. (1912) L. R. 40 I. A. p. 97. 4. (1909) 11 C. L. J., 2.

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wise, proceeded to lay down a third proposition and said that "from these propositions it necessarily follows that when a Shebait appointed by a founder fails to nominate a successor in accordance with the condition or usage of the endowment the management reverts to the representative of the founder." As I have said already I am unable to see the necessity. Where a founder commits the management of the charity to a trustee, the presumption raised or the legal inference drawn in cases where he makes no arrangement for the management, does not arise; and there is no presumption under the Hindu Law, any more than under the English Law, that he reserves any right of interference or reversion of management after he has once definitely placed the properties given by him in the possession and management of third parties. In a later case *Raj Krishna Dey* v. *Bepin Behari Dey* [1], that same learned Judge after stating the above 3 propositions held that on the failure of the scheme of management originally provided by the founder at the time of the foundation, it became incumbent on the representatives of the founder to make an appointment of a Shebait. Why the Shebaitship did not vest in all the representatives of the founder according to his third proposition is not clear. If it did the decree should be for settlement of a scheme providing for the actual exercise of the functions of the Shebait, by the numerous persons in whom that office vested as suggested in *Ramanathan Chetty* v. *Murugappa Chetti* [2], and not for the appointment of a trustee. It appears to me that these cases treat the trusteeship or Shebaitship as a species of private property which is vested as an absolute estate of inheritance in the founder, an estate in fee simple if I may borrow an expression from the English Law of Real Property, from out of which the founder is entitled to carve out a particular estate retaining the reversion which again becomes an estate in possession vesting in him or his heirs as the case may be, on the determination of the particular estate, the founder or his heirs being entitled either to enjoy it themselves or again to carve out a particular estate therefrom. This is to some extent natural if we remember that in northern India private religious endowments, as for instance to family idols, are very common. That certain kinds of 'Shebaitships' are treated as private property capable of being transferred by act of parties, and of being actually divided into shares

1. (1912) I. L. R. 40 C. 245 at 257. 2 (1906) I. L. R. 29 M.

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is clear from *Tripurari Pal* v. *Jagat Tarini Dasi*, [1] where a devise of Shebaitship was without question assumed to be valid and from *Kunjamoni* v. *Nikunja Behari Doss* [2] where its partibility was assumed. It need scarcely be pointed out that the office of trustee as we have in this case is inalienable and cannot be delegated, and any notion of their alienability, is contrary to the express decisions of the Privy Council as regards the trusteeship of Hindu Religious Endowments and religious offices. In several cases in this Court alienation of the trustee office which could have been supported as an exercise of the power of nomination if any such existed were held to be wholly void.

The assumption made in the Allahabad cases that a power of nominating new trustees is a right appendant to trusteeship, appears to me, with all respect, to be equally contrary to settled principles. An appointment of new trustee by the existing trustee or trustees is in effect nothing less than the transfer of the trusteeship, and a power to appoint new trustees cannot exist unless given by the founder at the time of foundation (see Perry on Trust, S. 287).

Mookerjee, J. also compared the rights of the Hindu charitable donor or his heirs to the rights of the founder of eleemosynary corporations. In the first place the establishment of an idol, the building of a temple, mutt or chattram or the endowment of property for their upkeep and maintenance may not be a 'foundation' at all and the principle of Hindu Law laid down by the Privy Council does not appear to be confined to charity corporations. Further though I have no precise notion of the nature of the rights of patronage and visitation vested in the private founder and his heirs, so far as I understand it, such rights cannot from the nature of the case, include a right of nomination of trustees. (See Lord Holt's opinion in *Philips* v. *Bury* [3].)

It remains now to consider the decisions of this Court. In appeal No. 50 of 1850 the Sudder Court held in general terms with reference to a katlai in the famous temple at Madura that the founders' representatives—I am using the term 'founder' in this judgment generally in the sense of donor of property to charity—had no right to interfere in any way in the management unless a power was reserved at the time of the gift. In appeal No. 52 of 1857 a right to appoint was upheld as such a power was found on the evidence to have been given by the founder.

1. L. R. 40 I. A. p. 87. 2. 22 C. L. J. p. 404.
(3) 2 Term. Rep. 352.

The most important case in this Court, however, is *Sathappayyar* v. *Periasami.*[1]. That was a case of a private religious endowment called the Sattappayyar Mutt which was first established by one of the Zemindars of Sivaganga. The position of the head of the Mutt towards the endowment was not merely that of a secular trustee; he was himself a beneficiary under the endowment, he being entitled to the income of the properties subject to certain disbursements. The Sivaganga Zemindars and the members of their family were beneficiaries only in a spiritual sense. The mode of succession prescribed by the original endowment was, for each head of the mutt called Sathappayyar, to appoint his successor. The last Sathappayyar who so succeeded was found guilty of breach of trust and was removed and there was a vacancy which could not be filled in accordance with the prescribed mode. The Zemindar of Sivaganga, the sole heir of the founder,—Sivaganga is an impartible Zemindary—prayed for possession of the endowed properties in order that they may be delivered over to another Guru to be appointed by him. It is not clear from the plaint whether he claimed the reversion of management or a right of appointment. The right of the plaintiff Zamindar is discussed in several places in the judgment. At page 7 of the report Muttusami Ayyar, J. than whom no one knew more of the religious and charitable institutions of this part of the country, said that "Exhibit I, the deed of endow-"ment, shows that the land in dispute was given for a specific 'religious purpose in order that that purpose might be carried "out in perpetuity for the benefit of the grantor's family, and "the respondent, as the representative of that family for the "time being, is entitled to step forth when that purpose is "neglected and the produce of the land is misapplied, and to *ask* "*the Court* to prevent the misappropriation, and to see that the "income of the endowment is applied to its legitimate purposes." This passage does not necessarily mean that as representative of the founder the plaintiff was only entitled to invoke the power of the Court, but that that evidently was his opinion will be clear from other portions of his judgment. At page 12 he expressly negatived the right of reversion of management and the reason which he gives, *viz.* that on the construction of the deed of endowment no such right can be deduced, conclusively shews that that

1. (1880) I. L. R. 14 M. p. 1.

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very learned Judge never imagined that under the Hindu Law there was any such reversion on the failure of the original line of trustees. The next paragraph is equally important. The first Court's decree which is set out at page 3 of the report declared that a trustee would be appointed by the Court *after consulting the wishes of the plaintiff* the Zamindar and the defendant the dismissed trusteee. The Zamindar the respondent insisted that the dismissed trustee should have no voice in the appointment, and that was allowed. He further claimed that the power of appointment vested in the *Zamindar for the time being*, that is, the heir of the founder. This again was negatived, for the right of nomination allowed to him, was in his capacity of one (though the most important) of the beneficiaries, and the concurrence of *all* the other beneficiaries was required. Even this right of nomination conceded to the beneficiaries, not be it noted to the heirs of the founder appears to be nothing more than a consultation of their wishes, though the decree is in a more positive form; in fact the learned Judge at page 12 states in terms that the only right which the plaintiff had was the right of a beneficiary under a private trust which is declared in S. 60 of the Indian Trusts Act. That that was the opinion of Best, J. is clear; for he agreed in dismissing the memorandum of objections of the plaintiff Zamindar except in so far as it related to the dismissed trustee having a voice in the appointment of a new trustee. The reference to the decree in the order of reference was however made under a misapprehension.

I have dealt with this case at some length as I consider that this decision is authority against the propositions laid down by Mookerjee, J. though it is cited by him as supporting those propositions. For the same reasons I am unable to agree in the judgment in *Doraiswamy Pillai* v. *Sandanathammal* [1] on this point where moreover the right of nomination of fresh trustees was conceded to a Christian settlor I would therefore answer the question in the negative.

A. V. V.

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1. (1915) 2 L. W., p. 577.

PRIVY COUNCIL.

Present :—The Lord Chancellor (Lord Buckmaster), Lord Atkinson, Lord Wrenbury and Mr. Ameer Ali.

[On Appeal from the Chief Court of the Punjab.]

Beg ... *Defendant* Appellant*

v.

Allah Ditta and others ... *Plaintiffs, Respondents.*

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Punjab Customary Law—Custom of agnatic succession—Exception in favour of daughters residing with husband in the paternal house—Khana-damadi—Riwaji-am-its evidentiary value.

Entries in the Riwaj-i-am are sufficient in themselves even though not supported by instances to prove the existence of a custom.

Appeal from a decree of the Chief Court of the Punjab reversing a decree of the Divisional Judge of Shahpur.

The parties in this case were Dabs, a sub-tribe of Mahommedan Jats, settled in the Jhang District in the Southern Punjab. The property in dispute had belonged to Shahamad, who died leaving a widow and a daughter, Jindwadi, but no son. Jindwadi married Daim, a collateral of Shahamad, and she and her husband resided with the latter. They had a son, the Appellant Beg. On the widow's death Jindwadi got Beg's name registered as proprietor in the Revenue Records.

Plaintiffs claimed from Beg one half of Shahamad's estate as his collaterals, alleging a custom of agnatic succession by which daughters were excluded. It was admitted that Daim was entitled as a collateral to the other half.

Beg denied plaintiff's right to succeed in the presence of his mother and himself, and alleged that his father Daim lived and worked with Shahamad. He alleged a custom by which a daughter married to a "Khana-damadi" or resident son-in-law was preferred to the agnates.

The District Judge found such custom proved by the *Riwaj-i-am* and dismissed the suit. The Plaintiffs appealed to the Divisional Judge, who affirmed the District Judge's finding. They further appealed to the Chief Court, which remanded the case for findings on other matters, and when it again came before them reversed the decision of the Lower Courts and decreed the suit, on the ground that the defendant

* October 31 and November 2, 1916.

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had not proved the custom on which he relied. They took the view that a mere statement in the Riwaj-i-am not corroborated by instances was insufficient to establish a custom. Hence this appeal.

Sir Erle Richards, K. C., and *O'Gorman*, for the Appellant.— The custom for which we contend is set out in Rattigan's Digest of Customary Law, Chapter 2, para. 23. The daughter succeeds in preference to collaterals if she marries in the family, and still more if her husband is Khana-damadi. The Riwaj-i-am of the Jhang District prepared at the settlement of 1880 shows this custom as prevailing among the Syals, of which the Dabs are a branch, but no instances are given, and hence the Chief Court has held, that we have not displaced the general custom of agnatic succession. In so holding they have followed their own rulings in 29, 89, and 108 P. R. 1900: but these cases are overruled by *Digambar Singh* v. *Ahmad Said Khan* [1].

The latter case dealt with the Wajib-ul-arz, and no doubt this ranks rather higher than the Riwaj-i-am, as it is part of the Record of Rights, and as such a Statutory presumptin in its favour is created by Ss. 31, 44 of the Punjab Land Revenue Act, 1887 (Act XVII of 1887): also it is signed by the co-sharers. But the Riwaj-i-am is drawn up, under rules, by the same settlement officer: it is admittedly evidence, and I submit is sufficient to shift the burden of proof upon the other side.

[*Lord Chancellor*.—I take it that the general custom of agnatic succession referred to by the Chief Court has never been in dispute].

I submit that (1) no such general custom can be presumed (2) even if it can, any evidence, even slight evidence is sufficient to shift the onus.

As to (1) up to 1872 the personal law prevailed in the Punjab, as elsewhere, in the absence of evidence of custom, but the Punjab Laws Act, 1872 (Act IV of 1872) S. 5 (a) put custom first. In India generally the onus is on you to show variation from personal law, but this is no longer so in the Punjab, where there is nothing like a Common Law or general custom, almost every proposition being over-laden with exceptions—Sir Charles Roe's Tribal Law in the Punjab, 1895, citing *Gujar* v. *Sham Das* [2].

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1. (1914) L R. 42 I. A. 10. 2. 107 P R. 1887.

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The Chief Court base their finding of general custom upon decisions, but the decisions are inconsistent. *Mussammat Sabban* v. *Ghazi* [1] and *Emna* v. *Sajawat Khan* [2], are so far against me; that in each the Chief Court treated the onus as being on the daughter to show a variation from the custom they took to be in force: but in a case from the adjoining District of Muzaffargarh, it was held that the daughter would have the right to succeed if she had married in the tribe. *Musammat Fatima* v. *Khanda* [3].

[*The Lord Chancellor*:—The case actually decided that if she married outside she did not succeed.]

Even if you assume a general rule excluding women, it can be displaced by the Riwaj-i-am. *Sheran* v. *Sharman* [4]. The Riwaj-i-am was treated as good evidence in *Jindwaddi* v. *Hassan Shah* [5].

Any presumption of general custom is easily shifted; *Sher Jang* v. *Ghulam Mohiuddin* [6].

Reference was also made to *Rolla* v. *Budha* [7] and *Bheli* v. *Fakir* [8]. Their Lordships' judgment was delivered (December 18, 1916) by

Mr. Ameer Ali.

Mr. Ameer Ali:—This is an appeal from a judgment and decree of the Chief Court of the Punjab, dated the 23rd of December, 1908, and arises out of a suit instituted by the plaintiffs, respondents, so long ago as the 4th April, 1900, in the Court of the Additional District Judge of Jhang, for possession of some landed property situated in that district.

The property in suit was owned and possessed by one Shahamad, a Mahommedan Jat, belonging to the sub-community of Dabs, settled in the Jhang district in Southern Punjab. Shahamad died many years ago, leaving a widow, Sahib Bibi, and a daughter named Jindwadi, who was married to a near cousin of the name of Daim. The defendant, appellant, is the son of Daim and Jindwadi. On Shahamad's death, his widow succeeded to his entire inheritance and remained in possession until her death, which is stated to have occurred a year before the litigation commenced. On the widow's death, Jindwadi, acting on behalf of her son, obtained an order from

1. 50 P. R. 1885.
2. 37 P. R. 1898.
3. 25 P. R. 1895.
4. 17 P. R. 1901.
5. 41 P. R. 1895.
6. 22 P. R. 1904.
7. 50 P. R. 1903 (F. B.).
8. 62 P. R. 1906.

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the collector for the registration of his name in the Revenue Registers as proprietor in succession to Shahamad.

The plaintiffs claim to be the collaterals or agnatic relations of Shahamad, and as such entitled by the custom of their tribe or community to their share of his inheritance on the death of the widow, to the exclusion of his daughter and the daughter's son. The action, however, is confined to a moiety of Shahamad's estate, as it is admitted that Daim was also a collateral and entitled to a half.

The suit was brought against Beg, who was evidently an infant at the time, under the guardianship of his mother. He denied the plaintiffs' title to the inheritance of Shahamad "in the presence of his daughter and grandson." He further alleged that Shahamad had executed a will under which also he was entitled to his grandfather's estate. He also stated that his father, Daim, lived and worked with Shahamad in his life-time. It is unnecessary to refer to the earlier stages of the suit, which proved infructuous. The first adjudication on proper issues was made by the District Judge on the 2Cth December, 1902. The real controversy between the parties is clear from the issues framed by him and his judgment thereon. It appears that whilst the plaintiffs based their claim to possession on a general custom of agnatic succession in their community or tribe, the defendant, without, so far as their Lordships can see, admitting the contention, alleged that a daughter married to a collateral who takes up his abode in the father-in-law's house and is known as the *Khanadamad*, or "resident son-in-law," succeeds to her father's inheritance to the exclusion of the agnates. And in support of this special custom he produced the *Riwaj-i-am* or "official records of custom, " in addition to a considerable amount of oral testimony.

Some of the issues were specifically directed to the respective contentions of the parties with regard to the custom. The District Judge in substance held that although there was a custom more or less general among the agriculturist tribes of the Punjab by which daughters were excluded from succession, the existence of another custom, by way of exception, was established by which married daughters residing with their husbands in the paternal house were not subject to the deprivation

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of the inheritance. He held also that the will set up by the defendant was proved. With regard to the custom alleged by the defendant, his conclusion is expressed in the following words :—

" Then the Khanadamadi" (the status of Daim as a resident son-in-law) " is "proved ; this is a recognised custom, that a daughter or her descendants get " the inheritance in preference to the collaterals. The same is the result of the " local commissioners' report and of the evidence of the witnesses for the " defendant."

He thus found expressly in favour of the existence of the custom on the basis of which the defendant contended the plaintiffs must fail ; and he accordingly dismissed the action.

From this judgment the plaintiffs appealed to the Divisional Judge, who affirmed the first Court's decree with a specific finding based on the *Riwaj-i-am* in accord with the District Judge. And he added that " nothing had been proved to contradict this custom "—the custom alleged by the defendant.

From this decision the plaintiffs preferred an appeal to the Chief Court. On this appeal the learned judges held that the will propounded by the defendant was genuine and that Daim was, in fact, a *Khanadamad* ; but they considered that the finding of the lower Courts was not sufficient for the disposal of the case and they accordingly remanded it for an enquiry as to whether the property left by Shahamad was ancestral or self-acquired, what his powers of disposition were, and so forth—questions, in their Lordships' opinion, wholly immaterial if the custom was established. The order of remand is dated the 16th November, 1905, and the appeal did not come on for further hearing until 1908.

After the remand the matter came before two different officers. The second District Judge, under the orders of the Divisional Judge (not the same Judge who had decided the first appeal), held an elaborate enquiry practically on the same points that had been already decided ; his report came before the Divisional Judge, who also went over at considerable length the same ground.

He put aside the statements in the *Riwaj-i-am*, apparently on the ground that they required to be proved by instances before any value could be attached to them. With regard to the evidence of instances, he thought it referred, with one exception, to other sections of the community, and did not apply to the

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Dabs. The Divisional Judge further held, in agreement with his predecessor, that the plaintiffs had, on their side, failed to rebut the defendant's allegation as to the existence of a special custom relating to the succession of married daughters among the Dabs.

On the return of the case to the Chief Court the appeal was reheard by two Judges, one of whom was a party to the order for remand. The question was this time confined to the existence of the custom alleged by the defendant; and the learned Judges, being of opinion that the defendant had failed to establish his allegation, reversed the decision of the first Divisional Judge, dated the 3rd February, 1904, and decreed the plaintiffs' claim.

From this decree the defendant Beg has appealed to His Majesty in council. Their Lordships cannot help thinking that, had it not been overlooked that the main issue in the case at which the Lower Courts had arrived at a distinct finding related to the existence of the custom, twelve years' ruinous litigation might have been avoided. It may be observed here that the Judges who decided in favour of the existence of the custom alleged by the defendant appear to have correctly apprehended the incidence of the *onus*.

In their Lordships' opinion the Chief Court are in error in supposing that the defendant did not discharge the onus that lay on him of establishing the custom he alleged. Assuming that there is a general custom of agnatic or collateral succession in default of male issue to the exclusion of female heirs among the agricultural tribes of the Punjab, about which the decisions of Punjab Chief Court are by no means uniform, specially in the case of Mahommedan tribes who are endogamous, it is clear that the rule is admittedly subject to a considerable number of exceptions. Mr. Rattigan, in his valuable work called "A Digest of Civil Law for the Punjab," enumerates the exceptions under paragraph 23. Sir Charles Roe, himself at one time a Judge of the Chief Court, in his "Tribal Law in the Punjab," lays particular stress on the value of the *Riwaj-i-am* as a record of tribal customs; and, he adds, that "a son-in-law of the house is a regular institution."

In the *Riwaj-i-am* filed in this case the custom alleged by the defendants is mentioned in express terms as in force among

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the Syeds, Kureshis, and Syals. With regard to the general body of Jats (in which term the sub-community of Dabs is clearly included) the custom is simply mentioned as "that prevailing among the Syals."

The *Riwaj-i-am* was produced and exhibited as evidence at the very outset of the case; it is a public record prepared by a public officer in discharge of his duties, and under Government rules; it is clearly admissible in evidence to prove the facts therein entered subject to rebuttal. In their Lordships' opinion, the statements contained in the *Riwaj-i-am* form a strong piece of evidence in support of the custom, which it lay upon the plaintiffs to rebut, and this, according to the findings of the Divisional Judges, they failed to do.

In their Lordships' opinion, the decree of the Chief Court cannot be sustained, and they will humbly advise His Majesty that it should be set aside, and the plaintiff's suit dismissed with costs in all the Courts in India. The respondents must pay the costs of this appeal.

Solicitors for the Appellants: *Ranken Ford, Ford and Chester.*

Solicitors for the Respondents: *T. L. Wilson & Co.*

A. P. P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Seshagiri Aiyar.

Natesa Pillai and others ... *Appellants* * (*Petitioners-Plaintiffs 2 to 4 and L. Respondents of the 1st Plaintiff*).

v.

Ganapathia Pillai and others ... *Respondents* (*Defendants*).

Natesa Pillai v. Ganapathia Pillai.

Limitation Act, Art. 182 (5)—*Application in accordance with law—Prior application for execution—Omission to file encumbrance certificate or to specify assessment on the land—Returned for correction but not represented—Whether saves time for a subsequent application—Observations on the state of the law in this respect.*

An application for execution presented within three years of a former application which was returned by reason of the omission to file an incumbrance certificate with that application and by reason of the omission to specify the assessment fixed on the land sought to be sold, but which was not represented afterwards is not barred by limitation under Art. 182 (5) of the Limitation Act. The former application is one in accordance with law in spite of those defects.

Observations on the uncertainty of the law as to an application being "in accordance with law" within the meaning of the Limitation Act and the desirability of legislative interference in regard thereto.

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* A. A. O. No. 2 of 1916. 5th December, 1916.

Natesa Pillai v. Ganapathia Pillai.

Appeal against the order dated 27th September 1915 of the District Court of South Arcot in Execution Petition Register No. 13 of Execution Petition No. 3 of 1915 in O. S. No. 4 of 1902.

S. Muthiah Mudaliar for Appellants.

V. Rathnasomanathan and *K. R. Subramania Sastri* for Respondents.

The Court delivered the following .

Ayling, J.

Judgments :—*Ayling, J.*:—The sole question for disposal in this appeal is whether the decree-holder's execution petition filed on 18th December 1912 is an application for execution in accordance with law within the meaning of Article 182 of the Indian Limitation Act (Schedule I). It was ordered to be returned for amendment on account of certain defects; but was never taken back and in consequence never amended.

The two defects which the District Judge regards as serious, and on account of which he has held the application to be inoperative to save limitation are: (1) The omission to file an encumbrance certificate with the application. (2) The omission to specify the assessment on the land sought to be brought to sale. The leading case on the point is *Ramanadan* v. *Periatambi* [1] in which the learned Judges say: "We are of opinion that the application of 1879, although not complying in every particular with the requirements of S. 235 of the Code of Civil Procedure (XIV of 1882), was substantially an application made in accordance with law, and that, although it was returned for amendment and nothing further was done upon it, the application gives a fresh starting point from the date of its presentation." This principle has been followed in numerous subsequent cases in which the importance of various defects has been considered. It has usually been decided that they were insufficient to justify the application being treated as one not in accordance with law.

It was apparently argued before the District Judge that no defect or omission was material as long as there was an application of some kind for the execution of the decree in the manner provided by law. This contention was rightly rejected by him and he very reasonably remarks that a line must be drawn between applications which, though defective, are to be considered as in accordance with law, and applications which are so defective as not to be treated as applications at all for this

1. (1883) I. L. R. 6 M. 250.

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purpose. This no doubt is so; and it is by no means easy to say where the line should fall. But I feel little hesitation in saying that the defects in the present case could not be considered as disabling, without running counter to reported decisions of this Court. The application was no informal petition but one drawn up in the form prescribed by the rules. It is not contended that the failure to represent it after amendment makes any difference, apart from the nature of the defects. The failure to state the assessment on the land can hardly be treated as more serious than the failure to specify a previous execution application, which has been held to be a mere formal defect, so long as it did not prejudice the judgment-debtor or mislead the Court. Vide *Rama* v. *Varada* [1], which is a case on much the same lines as the present one. The obligation to file an encumbrance certificate is imposed by Rule 148 of the Civil Rules of Practice just as the obligation to file a copy of a decree is by Rule 164 and the observations of the Court in *Pachiappa Achari* v. *Poojali Seenan* [2], are as applicable to the one case as to the other.

But while I feel no doubt of the result of the present case, if the spirit underlying the previous decisions of this Court be applied, I am conscious that the law as therein enunciated is undesirably vague from a practical point of view. It appears to be generally conceded that an execution application may be so defective as not to be an application according to law at all; but what would constitute such defects is a matter of doubt. There are apparently conflicting decisions of this Court (at any rate decisions not easy to reconcile) as to the effect of failure to verify the execution petition. Vide *Raghunatha Thatha Chariar* v. *Venkatesa Tawker* [3] and *Ramayyan* v. *Kadir Bacha Sahib* [4]. If I may say so, it seems worthy of consideration whether legislation should not be resorted to in order to make the position of parties clearer. An enactment that from henceforward no petition dismissed or struck off for any default of the party presenting it should be treated as a step in aid for the purpose of saving limitation, would, as it seems to me, impose no real hardship on decree-holders and would make the law certain. In a matter of this kind, it is of supreme importance that a decree holder should be

1. (1892) I. L. R. 16 M. 142.
2. (1905) I. L. R. 28 M. 557
3. (1902) I. L. R. 26 M. 101=12 M. L. J. 485.
4. (1907) I. L. R. 31 M. 68=17 M. L. J. 596.

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always in a position to know when the time for execution of his decree will expire.

I would set aside the order of the District Judge and direct him to restore the petition to file and dispose of it according to law.

I would make no order as to costs.

Seshagiri Aiyar, J.:—I am of the same opinion. The decree in this case was passed on the 22nd February 1910. An application for execution was presented on the 18th December 1912. It was returned to the decree-holder with directions to furnish certain information. It was not re-presented. The present application was filed on the 2nd January 1915. The District Judge has held that the application of December 1912 was not in accordance with law and that the failure to re-present it prevented its operation as a step in aid of execution.

On the second question, it is well settled that under article 182 of the Limitation Act, it is the date of the presentation of the application that counts. The facts that it was returned and that no orders were passed thereon do not affect the question.

The first question is more difficult. The course of authorities in this Presidency has been very indulgent to the decree-holders. It is open to doubt whether this partiality has not resulted in encouraging parties to present applications often carelessly and not infrequently with reckless disregard of the requirements of the law. The Limitation Act gives three years for filing the first application. This period is long enough to enable the most indifferent suitor to collect all the necessary information before applying for execution. Still, it is our painful experience, that petitions are lodged which are absolutely incapable of having a decision passed on them, in the hope it may serve to furnish a new starting point. In my opinion, a stricter provision of law might conduce to speedier remedy and to the avoidance of applications, which only in name, answer to what the law expects of the party. I would suggest that the legislature should enact a clause to the effect that a party failing to comply with the demand to furnish the necessary legal information should not have counted in his favour the defective application he had presented.

I shall now proceed to see whether the application of December 1912 was in accordance with law, as understood in this Presidency. I do not propose to examine the case-law of the other High Courts, as admittedly, there is no consistency in the

pronouncements of the various High Courts on this question. Before considering the Case-law, the peculiar features of the application in question may be stated. The endorsement returning the application was in these terms: "Pleader's fee claimed is excessive. It should be calculated on the amount to be realised in execution. This application should be accompanied by encumbrance certificates. Draft sale proclamation *i.e.*, (Vide Rule 66 of Order XXI, C. P. C). Item No. 93 not fully described. Returned. Time allowed 15 days". The District Judge has held, and we agree with him, that the wrong calculation of the pleader's fee did not affect the legality of the application. As regards item No. 93, the learned Vakil for the respondents has conceded that the application was not defective in not giving the proper description of the property.

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The production of an encumbrance certificate is not a requirement of the Code of Civil Procedure. It only requires the party to state whether the property was subject to an encumbrance. I am satisfied on reading the application that this information was furnished. But the Rules of the High Court provide for the Court calling upon the decree-holder to produce an encumbrance certificate. As at present advised, I am not prepared to hold that if an application is in other respects legal, the failure to comply with a demand to produce an encumbrance certificate would have the effect of making it "an application not in accordance with law". There have been numerous cases in this Court in which failure to comply with the rules of practice has not been regarded as affecting the validity of the application.

The only other information that was not contained in the application related to the production of a draft sale proclamation. Order XXI, Rule 66, does not in terms say that a draft of that kind should be annexed to the application. Clause (e) empowers the Court to call for such information as would enable it to settle the proclamation of sale. In this particular instance, what the party failed to state was the assessment due on the land sought to be sold. That is a material information. The Court, instead of requiring the party to give this specific information asked for a "draft sale proclamation". The rule to which the endorsement drew attention does not support such a requisition being made. At the same time, I am clear, that a party failing to assist the

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Court in this particular can have no grievance if the application is rejected as not being in accordance with law.

It is not necessary to examine the case-law at any length. In my opinion, any application which does not comply with the requirements of Order XXI, Rule 11 (2) or with the provisions of the Code which imposes a statutory obligation on the applicant to furnish information would not be in accordance with law. Such an application may serve to start a new period of limitation only if the demands of the Court to supply the defects are complied with. *Ramayyan* v. *Kadir Bacha Sahib* [1] and *Ramanadan* v. *Periatambi* [2] are not against this proposition. In the first of these cases, it was held that as the decree was in the court, the failure to furnish a copy did not detract from the application. In the second case, an arithmetical error in the calculation of interest was held not to vitiate the application. It was held in a number of cases that if the court and the judgment debtor are not likely to be prejudiced by the want of the particulars, the application should be regarded as being one in accordance with law. *Rama* v. *Varada* [3], *Raghunatha Thatha Chariar* v. *Venkatesa Tawker* [4] and *Kamatchi Ammal* v. *Pitchu Iyer* [5]. It is not easy, in a given instance to say definitely how far the opposite party or the court may or may not be prejudiced. I do not regard these decisions as laying down that a party is entitled as a matter of right to claim that a statutory disregard by him should not count against him. All that was said in these cases was, that the particulars called for were not of such a nature as would have prevented the court from acting on the petition. I am in entire accord with the proposition enunciated in *Pachiappa Achari* v. *Poojali Seenan* [6] that if an application is so defective that a court cannot pass orders thereon in execution, it should not be regarded as being one in accordance with law. See also *Srinivasa Aiyangar* v. *Tirumalai Chetty* [7].

In the present case, I am not satisfied that the party failed to supply any information which the Code makes it incumbent upon him to furnish. I would, therefore, set aside the order of the District Judge and remand the application to him for disposal on the merits.

C. A. S.

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1. (1907) I. L. R. 31 M. 68.
2. (1883) I. L. R. 6 M. 250.
3. (1892) I. L. R. 16 M. 142.
4. (1902) I. L. R. 26 M. 101.
5. (1916) 31 M. L. J. 561.
6. (1905) I. L. R. 28 M. 557.
7. (1914) M. W. N. 372.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Aiyangar.

Vutuchuru Ramachandra Reddi and others. *Appellants* * (*Defendants Nos. 35, 52 and 85.*)

v.

Kakutur Audemma and others .. *Respondents* (*Plaintiff and Defendants Nos. 1 to 3 and 6*).

Rama-chandra Reddi *v.* Audemma.

Res Judicata—*Hindu Law—Widow—Suit under Limitation Act of* 1877 *for recovery of husband's property—Dismissal on question of limitation—Reversioners suit after death of widow for recovery of same property—Maintainability—Distinction between Limitation Act of* 1859 *and Acts of* 1871 *and* 1877.

Where a suit instituted by a Hindu widow after the Limitation Act of 1877 came into force for the recovery of possession of her husband's property was dismissed on the question of limitation, *held* that a suit by the reversioners for the recovery of the same property after the death of the widow was not barred by *res-judicata* *Hari Nath Chatterjee* v. *Mothurmohan Goswami* [1], Expld. and distgd. *Khunni Lal* v. *Gobind Krishna Narain* [2] Ref. to. *Hanuman Prasad Singh* v. *Bhagauti Prasad* [3] Rel. upon.

Distinction between the Limitation Act of 1859 and the Acts of 1871 and 1877 pointed out.

Appeals against the preliminary and final decrees of the Court of the Temporary Subordinate Judge of Nellore in O. S. No. 7 of 1912.

The suit was for the recovery of the properties of one Chenchurami Reddi and was instituted by one of his daughters. Chenchurami Reddi died in 1878 leaving behind him his widow Ramalakshmamma and 4 daughters including the plaintiff but no male issue. Ramalakshmamma died in 1908. During her life-time, that is in 1895, she had instituted O. S. No. 13 of 1895 for the recovery of properties in the possession of the 6th defendant in the suit of which the above appeal arose. That suit was dismissed on the ground of limitation and the decree therein was relied upon by the 6th defendant in the suit giving rise to the above appeal as having the effect of *res judicata*. The Subordinate Judge over-ruled the plea and held that the suit was not barred by *res judicata*. Against his decree the defendants

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* A. S. Nos. 257 of 1913 and 209 of 1914. 22nd November, 1916.

1. (1893) I. L. R. 21 C. 8 (P. C.) 2. (1911) I. L. R. 33 A. 356 (P. C.)

3. (1897) I. L. R. 19 A. 357.

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preferred the above appeal to the High Court on the ground, amongst others, that the suit was barred by *res judicata* by reason of the decree in O. S. No. 13 of 1895.

B. Narasimha Rao, S. Subrahmania Aiyar and *R. Raghavendra Rao* for Appellants.

T. V. Venkatarama Aiyar and *B. Somayya* for Respondents in A. S. No. 257 of 1913.

The Court delivered the following

Judgment:—Respondents Nos. 2 and 3 (1st and 2nd defendants in the suit) were not brought on record in this appeal within the time allowed. No proper explanation is given for the delay. The appeal is dismissed as against them with costs.

There is no substance in the objection raised by the plaintiff-respondent that because the 2nd and 3rd respondents, her sisters, were not made parties in time, the appeal must be dismissed as against herself as well. The appellants take exception to particular items of property in which the plaintiff-respondent has been given ¼th share by the decree appealed from. If the appellants succeed the result would be that the respondent to the extent of ¼th share would be liable to make restitution. It may be that the 2nd and 3rd respondents would still retain their shares, but it does not lie in the mouth of the plaintiff-respondent to complain of that.

The only substantial question raised in the appeal is as to the effect of the judgment in O. S. No. 13 of 1895. In the first place, it is argued that the widow of Chenchurama Reddi *i.e.*, Ramalakshmamma having brought a suit against Lakshmamma (5th respondent) for possession of property and that suit having been dismissed on the question of limitation the decree operates as *res judicata*. The present suit is by the reversioner whose title is independent of that of the widow. It is however contended on the strength of the decision of the Privy Council in *Hari Nath Chatterjee* v. *Mothurmohan Goswami* [1] that the effect of the decree was to bar the present suits. But that decision is distinguishable on the ground that in that case title by adverse possession had been completed while Act XIV of 1859 was in force, and by S. 12 of that Act, according to the rulings, it was not only the right of the widow to recover possession that would be barred but the right of the reversioner as well,

1. (1893) I. L. R. 21 C. 8.

Rama-chandra Reddi v. Audemma.

that is to say, adverse possession for 12 years had the effect under the law at the time of extinguishing the title of the widow as well as of the reversioner to the property. Under the later Acts title by adverse possession against the reversioner commences only on the death of the widow. That the decision in *Hari Nath Chatterjee* v. *Mothurmohan Goswami* [1] was based on the ground that the title by adverse possession was completed while the Act of 1859 was in force, seems reasonably clear from a recent decision of the Privy Council in *Khunni Lal* v. *Gobind Krishna Narain* [2]. There their Lordships point out the effect of S. 12 of Act XIV of 1859 and say that the subsequent acts of 1871 and 1877 could not lead to the revival of a right that had already become barred. They go on, then, to draw attention to the ruling in *Hari Nath Chatterjee* v. *Mothurmohan Goswami* [1] where it was observed that " the intention of the law of limitation is, not to give a right where there is not one, but to interpose a bar after a certain period to a suit to enforce an existing right." We think it can be fairly inferred that in *Khunni Lal* v. *Gobind Krishna Narain* [2] the Judicial Committee intended to point out that their decision in *Hari Nath Chatterjee* v. *Mothurmohan Goswami*[1], was based mainly on the provisions of the Act of 1859. Mr. Justice Knox of the Allahabad High Court in *Hanuman Prasad Singh* v. *Bhagabhati Prasad* [3] also understood the last decision in this light. In a recent decision of this court by the learned Chief Justice and Justice Burn where the facts were similar to the facts in the present case, the learned Judges held that *Hari Nath Chatterjee* v. *Mothurmohan Goswami* [1] did not apply, though they distinguished it on the ground that the previous suit in that case was by a daughter and not by a widow.

In the present case the question of limitation in the suit of 1895 was governed by Art. 141 of the Act of Limitation of 1877 and under that Act the reversioner's suit would not be barred because of the widow's right of suit having been barred. It is difficult to see how a decision against the widow who did not establish her right to recover the property for 12 years, could possibly operate against the reversioner who does not acquire a title to possession until the death

1. (1893) I. L. R. 21. C. 8 2. (1911) I. L. R. 33 A. 356.
3. (1897) I. L. R. 19 A. 357.

Rama-chandra Reddi v. Audemma.

of the widow. The only question of any difficulty to be considered was whether the judgment of the Privy Council in *Hari Nath Chatterjee* v. *Mothurmohan Goswami* [1] laid down a general proposition that a decree on the question of limitation against the widow *ipso facto* barred the rights of the reversioner. If that decision was arrived at having regard to the effect of S. 12 of Act XIV of 1859, there is no good reason for extending it to a case which is not affected by that Act.

The next question argued is that as a matter of fact it was found that Lakshmamma was in possession of the property for 12 years in the suit of 1895. We cannot say that there is any such definite finding in the judgment of the High Court in the appeal in that suit. That ground also fails. The question as to whether certain items of property to which the appellant derived his title from Lakshmamma was mortgaged to him for binding purposes, has not been pressed before us.

The result is that the Appeal No. 257 of 1913 will be dismissed with costs of the first respondent. In the decree of the Lower Court, ¼th of item No. 32 has been omitted by mistake; the decree shall include this property as well, that is to say the plaintiff will be declared to be entitled to ¼th share of this property as well. The Subordinate Judge has also failed to provide for costs in the final decree. The plaintiff will be entitled to and be liable for costs in proportion to the success or failure of her claims as between herself and all the defendants except 1 to 4 in the Lower Court. The memorandum of objections in Appeal No. 209 of 1914 is dismissed with costs.

A. S. V.

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1. (1893) I. L. R. 21 C. 8.

PRIVY COUNCIL.

Present:—The Lord Chancellor, Lord Atkinson and Sir John Edge.

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Mrs. Azeeza Joseph Solomon Joseph, since deceased (now represented by Elias Joseph Solomon and others, the Executors under her Will). ... *Appellants**

v.

The Corporation of Calcutta ... *Respondents.*

P. C. — Joseph v. The Corporation of Calcutta.

Calcutta Municipal Act 1899, *Ss.* 341, 617, 618 and 619—*Payment of compensation for demolition of building whether a condition precedent to demolition under the Act—Court competent to fix compensation in case of dispute—Claim for declaration that buildings were erected before* 1863—*Claim denied to a substantial portion of the buildings in the first court but admitted at the hearing of the appeal in the High Court—Granting of a declaratory decree—Specific Relief Act, S.* 42.

On the true construction of S. 341 (3) of the Calcutta Municipal Act, the assessment of compensation is not a condition precedent to the demolition of structures.

Under S. 617 of the Calcutta Municipal Act, the only court competent to fix the compensation in cases of dispute is the court of small causes; and the question is not cognisable by any other courts.

Where the plaintiffs sued for a declaration that certain structures were affixed before the first of June 1863, that they are entitled to compensation and many other reliefs and the defendants denied the claim to a substantial portion of the structures and the court of first instance decreed the suit in its entirety and the defendants appealed to the High Court, and at the hearing of the appeal, the defendants admitted that the structures were put up before the 1st of June 1863 but contested the granting of the other reliefs, and the High Court proceeded on the admission but found that the other reliefs could not be granted, and dismissed the plaintiff's suit.

Held, the High Court ought to have incorporated the admission in their decree instead of merely referring to it in their judgment and there should also be a declaration that the plaintiffs were entitled to be paid reasonable compensation.

DeGruyther K. C. and *Sir William Garth* for the Appellant.

A. M. Dunne for the Respondents.

The Judgment of the Board was delivered by

Lord Buckmaster, L. C.

Lord Chancellor:—In this case the appellants are the owners of a bazaar in Kidderpur, which abuts upon two public streets known as Garden Reach Road and Diamond Harbour Road respectively. Along the frontages of these streets there are a number of verandahs or shops connected with the main buildings and erected upon culverts or platforms placed over drains which

* 17th July, 1916.

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run by the side of the roads. The streets and drains are vested in the respondents as the Corporation of Calcutta, and they, on the 13th July, 1905, and the 21st April, 1908, served notices (under S. 341 of "The Calcutta Municipal Act of 1899") upon the appellants, requiring the removal of these fixtures in Diamond Harbour Road and Garden Reach Road respectively. The provisions of S. 341, so far as it affects service of the notices, is not material, but it contains, in sub-section 3, certain provisions material to this dispute, which are in these terms:—

"If the owner or occupier of the building proves that any such fixture "was erected before the first day of June, one thousand eight hundred "and sixty-three, or that it was erected on or after that day with the "consent of any municipal authority duly empowered in that behalf, the "Corporation shall make reasonable compensation to every person who suffers "damage by the removal or alteration of the fixture."

The appellants paid no attention to the notices, and the respondents accordingly made application to the magistrate for demolition of the structures as to Diamond Harbour Road, on the 22nd November, 1905 and as to Garden Reach Road, on the 5th November, 1908. Orders were made on both these summonses—the first on the 22nd December, 1906, and on the second on the 27th May, 1909.

A rule *nisi* was obtained by the appellants to discharge the Order relating to Garden Reach Road, but this rule was set aside on the 22nd July, 1909.

On the 6th August, 1907, the respondents, in answer to an application of the appellants, offered 178 rupees as compensation for certain of the erections in Diamond Harbour Road; on the 6th August, 1909, a similar application was made in respect of Garden Reach Road, and no reply having been received by the 20th August, 1909, these proceedings were instituted. At this time no steps whatever had been taken by the respondents to enforce the order for demolition, nor, excepting in respect of the one set of premises in Diamond Harbour Road, had they made any offer for compensation if demolition took place. In fact as appeared in the proceedings, the Corporation denied the right of the appellants to be compensated, upon the ground that, with a certain exception, the buildings in question had not been erected before the 1st June, 1863. The relief sought in the suit was ranged under five heads.

The first asked for a declaration that the structures in dispute had been affixed before the 1st June, 1863. The second,

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that the plaintiffs were entitled to compensation for the loss that they would suffer by their compulsory removal. The third, that the Corporation could not remove the structures until reasonable compensation had been paid. The fourth asked the Court to fix the amount of compensation. The fifth asked for an injunction restraining the Corporation from interfering with the structures until the compensation was paid.

The Corporation specifically denied the allegation that the structures in Garden Reach Road had been erected before the 1st June, 1863; but as to Diamond Harbour Road they gave a more qualified denial, and admitted that part of them had been erected before that date. They disputed that the payment of compensation was a condition precedent to the removal of the fixtures, and they alleged that under S. 617 of the Calcutta Municipal Act the claim with regard to Diamond Harbour Road was bad in law, and that the suit could not be entertained by the Court.

The Subordinate Judge found in favour of the plaintiffs upon all the issues, and allowed compensation to the plaintiffs to the extent of 122,000 rupees. From his decree the respondents appealed to the High Court, and on the hearing of the appeal for the first time they admitted that all the fixtures in dispute had been erected before the 1st June, 1863; this admission having been made, the High Court reversed the decree of the Subordinate Judge, and dismissed the action with costs. From this judgment of the High Court the present appeal has been brought, seeking to restore in all particulars the decree of the Subordinate Judge.

The two questions of law that arise for consideration can be briefly disposed of.

The *first* relates to the true construction of S. 341. Their Lordships cannot find anything in this section which renders the assessment of compensation a condition precedent to the demolition of the structures. The words of the section, which have already been quoted only provide for compensation to the person "who suffers damage" by the removal. Until the removal is effected no damage is in fact suffered at all, and there is but little advantage to be gained in considering, as counsel for the appellants desired their Lordships to do, the questions of compensation under the Lands Clauses Act of 1845, or the consideration of

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whether, in certain circumstances, assessment of compensation ought to be a necessary condition precedent to interference with property. It is sufficient that, in their Lordships' opinion, the words of the statute, construed as they stand, do not furnish any ground upon which to support the appellants' claim.

The next point is whether, under section 617, the fixing of compensation in case of dispute is not placed in the Court of Small Causes, so that the question was not cognisable by the Court in which the present suit was instituted. Their Lordships think that, in this respect also, the judgment of the High Court was clearly correct. Omitting irrelevant and unnecessary words for the present purpose, section 617 provides this:—

"Where . . . . any municipal authority . . . . is required by.. . . . "this Act to pay . . . . compensation, the amount to be so paid, and, if "necessary, the apportionment of the same, shall, in cases of dispute, be "determined . . . . by the Court of Small Causes."

Their Lordships find it quite impossible to understand how these words can be read so as to exclude the present dispute from their meaning; and, indeed, counsel for the appellants did not contend that section 617 read alone would bear that interpretation, but they suggested that the effect of sections 618 and 619 would be to show that section 617 was not intended to apply to claims by a person against the municipality, but only by the municipality against other parties. Now sections 618 and 619 refer to the means to be taken in order to obtain payment and recovery of expenses or compensation awarded in 617. And in both of these sections reference is made to the claim being a claim enforceable only against a person, the words "municipal authority" being omitted. The respondents say that in these sections, by virtue of certain interpretation clauses, the word "person" includes "municipal authority." It may be so, but in their Lordships' opinion it is quite unnecessary to decide the question. Even assuming the appellants' view of Ss. 618 and 619 to be correct, it amounts to nothing more than this—that a special means of recovery of the amount awarded is given to the municipality which is not given to the individual, but from this it does not follow that the amount of compensation payable by the municipality to the individual, when in dispute, should not be fixed and determined under the earlier section. So far, therefore, as the suit sought relief under any but the first two heads, it was misconceived, and the whole of the expenses thereby occasioned were thrown away.

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Their Lordships think, however, that, in the circumstances of the case, the appellants were entitled to ask for relief under the first two heads of their claim. When the proceedings were started the Corporation was not prepared to admit the claim to compensation excepting in respect of a small portion of the premises in Diamond Harbour Road. Orders were outstanding for demolition. These orders might have been enforced at any moment, and, as the matter stood, they would have been enforced by the Corporation under an assertion that, except for a small amount, no compensation would be payable in respect of the damage done. This seriously affected the appellants' right of property in these structures, and they were entitled to ask for a declaration in respect of this right under the Specific Relief Act (section 42). It does not, of course, follow that the Judge would be bound to give the declaration sought, but their Lordships think that the discretion of the Subordinate Judge would have been rightly exercised in granting such a declaration or in making an equivalent order. When, however, the matter proceeded to the Court of Appeal, the whole of this dispute was abandoned. There was no longer any controversy as to the date when the buildings were erected, and the Corporation made a plain admission that they were all built before the 1st June 1863. If the High Court had incorporated this admission into the actual form of their decree, instead of referring to it in the reasons which they gave, their judgment would have been correct in form, as it was, in their Lordships' opinion, correct in substance, and the appellants would have had no ground for complaint. This, however, they omitted to do, and though the matter is in one sense a matter of technicality, yet, upon the whole, their Lordships think that the appellants are right in saying that the decree ought to be amended in this particular.

The Corporation have really raised no objection to this step being taken, but complain that this was not the substance of this appeal and did not form the real substance of the original suit. This matter their Lordships have taken into consideration in dealing with the costs of the proceedings; and the order which they will humbly advise His Majesty to take will be that the decree of the High Court be amended by introducing an admission on the part of the Corporation that all the structures affected were erected before the 1st June, 1863, and

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that the appellants are entitled to be paid reasonable compensation by the Corporation for the loss which the appellants would suffer, if and when such structures are compulsorily removed by the Corporation, and that so amended it be confirmed.

The Corporation will pay the appellants' costs of the action upon the footing that the only relief this action asked was that contained in Clauses (A) and (B) of the prayer in the plaint.

The appellants will be ordered to pay the respondents' costs of all the other issues in the suit. Those costs will be set off *pro tanto* one against the other. The order of the Court of Appeal as to costs will remain and no costs will be allowed of this appeal.

Solicitors for the Appellants :—*Watkins and Huntur.*

Solicitors for the Respondents :—*Orr, Dignam & Co.*

PRIVY COUNCIL.

Present :—Lord Shaw, Lord Parmoor and Mr. Ameer Ali.

[On Appeal from the High Court at Central Provinces.]

Diwakar, Minor through his next friend Rao Bahadur Indraraj Bhau ... *Appellant* *

v.

Chandanlal, Minor, under the guardianship of Musammat Jasoda Bai and others ... *Respondents.*

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Diwakar v. Chandanlal.

Hindu Law—Adoption—Proof—Absence of deed of adoption or other written record—No entries of expenditure on ceremonies in account books.

When there is no deed of adoption, or other formal written record, when the ceremonies said to have taken place were of the briefest possible description and when the child's name was not changed and he was never taken to live with his new family or recognised by them in any way, it is highly improbable that the adoption took place.

Having regard to the habits of the Indian people with regard to the keeping of accounts regarding their most minute transactions, the absence of any reference to expenditure on the ceremony of adoption in the accounts either of the natural or of the adoptive father covers an alleged adoption with suspicion.

DeGruyther K. C. and *J. M. Parikh* for the Appellant.

Sir Robert Finlay K. C., Sir Erle Richards K.C. and *Dunne* for the Respondents.

The Judgment of their Lordships was delivered by

Lord Parmoor.

Lord Parmoor :—The only question raised in this appeal is whether the late Mahipat Rao Bhau adopted the appellant Diwakar

* 24th July, 1916.

as his son, and heir to the Hatta Zamindari on the 10th November 1898. If the adoption did take place, the adoptive father could not subsequently revoke the adoption. It is not argued that he had any such power.

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The appellant was born on the 26th October, 1898, and was the second son of Indraraj Bhau. Mahipat Rao was a relation on the agnatic side and had had eight children by his deceased wife all of whom had died in infancy, except Gotoo, who died in 1894 aged about 16. At the time of the alleged adoption Mahipat Rao had two young wives, one married in 1891, and one in 1895. There was no reason why he might not have further issue; two children were in fact born to him at a later date. Both Indraraj and Mahipat Rao were Zamindars of considerable position.

There was no deed of adoption and the case for the appellant depends almost entirely on oral testimony. The Judge of the District Court found in favour of the appellant. This judgment was reversed in the Court of the Judicial Commissioner, Central Provinces. In their Lordships' opinion it is important to appreciate the general position of the parties and the surrounding circumstances before attempting to determine what weight should be attached to the evidence called on behalf of the plaintiff.

Indraraj, the appellant's father, resided at Fulchur. Mahipat Rao with his two wives, respondents Nos. 2 and 3 went to Fulchur to be present at the appellant's Barsa, a ceremony performed twelve days after the birth of an infant. They stayed at Fulchur a few days after the Barsa and the alleged adoption is said to have taken place on the 10th November, 1898. Subject to two matters, to which attention will be drawn, it is clear that Mahipat Rao from the outset and during his life consistently denied that the plaintiff was his adopted son. A letter of the 10th February, 1899, written only three months after the date of the alleged adoption supports the case of the respondents and is inconsistent with that of the appellant. This letter refers to arrangements having been made "for taking off younger Bhau's Zalar near Pinglai Goddess on the 18th February, 1899." In reference to this letter, Indraraj says in his evidence: "The removal of the first hair of a boy in my family is made in the temple of Pinglai at Bhandara." When the appellant's hair was removed Mahipat Rao was invited, but for some reason or other he was

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unable to attend. It is further stated that Mahipat Rao did not bring his children to Bhandara to be shaved, and that he had not written to Indraraj in reference to the ceremony. At some time between the 11th January and the end of March 1899, Kaluram Pachourey, District Saugor, visited Mahipat Rao, and had a talk with him about the adoption of the boy. His evidence is that Mahipat Rao told him that the members of Lataria Bhau's family expresed to him a desire that the new-born son might be adopted by him, but that he did not express his willingness, or agree to the proposal. In August 1902, Indraraj was told by Mr. Laurie that Mahipat Rao was denying that he had adopted the appellant, and Indraraj states that after this denial he had no talk with Mahipat Rao about the adoption. The evidenee of Mr. C. E. Low, who was Deputy Commissioner of Balaghat throughout the year 1906, is to the same effect. He says that Indraraj had a talk with him about the marriage of his son (the appellant), and that Indraraj asked him to persuade Mahipat Rao to admit that he had adopted the appellant. After this conversation Mr. Low saw Mahipat Rao, who said that he did not admit the adoption and could not bear the expenses of the appellant's marriage. On the 17th January, 1907, Indraraj wrote to Mahipat Rao, saying that it was eight years since he had taken the appellant in adoption, and that the marriage ceremony of the appellant could not under any circumstances be postponed. On the 26th January, Mahipat Rao replied, saying that the whole story was false and that the act of adoption had not been done at all. It is unnecessary to examine further this part of the case since the Counsel for the appellant was unable to point to any act or statement of Mahipat Rao which in any way admitted the adoption of the appellant, except a statement in a letter written by Kelkar in 1902, and an alleged procession at Hatta on the 2nd June, 1901, at which date it is said that the appellant was taken to Hatta with his natural parents with some pomp, and that the visit was the occasion of considerable rejoicings. The incident of the alleged procession at Hatta is put forward as an important factor in the plaint of the appellant, but the evidence was disbelieved by both Courts, and throws suspicion on the appellant's case.

Kelkar was the pleader representing the respondents, but called as a witness on behalf of the appellant towards the end

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of the appellant's case. A letter said to have been written by Kelkar to Indraraj on the 2nd February, 1902, was produced, in which Kelkar said that Mahipat Rao admitted that the appellant was his son. The importance of the letter is that it supports the view that Mahipat Rao did admit on this occasion the adoption of the appellant. Kelkar himself states that he had a talk about adoption with Mahipat Rao subsequent to the letter, and that Mahipat Rao then emphatically denied the adoption, and that to his recollection Mahipat Rao never at any other time made any admission as to the adoption, and that his impression was that Mahipat Rao was denying the adoption, and that he said so to Mr. Low and Mr. Bathurst. Their Lordships cannot attach any importance to a letter produced under such circumstances, and which contains a statement in direct contradiction of what is proved to be the general attitude of Mahipat Rao in denying the adoption of the appellant. There is no reason to doubt that Mahipat Rao did from the outset consistently deny that he had adopted the appellant. Under these circumstances it is a matter for grave suspicion that, though it was open to Indraraj to commence a suit claiming to have the adoption of the appellant declared valid, no such suit was comenced until two and a half months after Mahipat Rao's death.

The case for the respondents is further strongly corroborated by the absence of any reference to expenditure on the ceremony of adoption, either in the accounts of Indraraj or Mahipat Rao. The importance of the evidence afforded by accounts has been recognised by this Board (*Musammat Lal Kunwar* v. *Chiranji Lal* [1]) :—

"Having regard to the well-known and often proved habits of the Indian "people with regard to the keeping of accounts, recording their most minute "transactions, the non-production of any book, in which anything connected with "the ceremony was entered covers the plaintiff's case with suspicion."

The accounts of Indraraj are set out in the record starting from the 6th November, 1898, and extending over the period in which the adoption is said to have taken place. There are a number of items of expenses incurred in connection with the appellant's Barsa, but not a single item of expenditure in reference to the ceremony of adoption, or any entry which indicates that any such ceremony ever took place. It was suggested that the expenses of the ceremony of adoption might be found in the

1. (1909) L. R. 37 I. A. p. 1.

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accounts of Mahipat Rao as the adoptive father. Mahipat Rao's accounts set out in the record tell the same story. There is no item of any expense incurred in the ceremony of adoption, although a considerable sum is included under the head of Barsa expenses.

There was no deed of adoption or any other formal written record of the event at the time. The appellant's horoscope was produced at the hearing by the family astrologer, but if any importance is to be attached to this document it is not to the advantage of the appellant's case. This document was filed on the 25th October, 1907. The witness alleges that the red ink postcript, reciting the appellant's adoption, was written on his return after performing the ceremony, but it is made more than suspicious by the addition of the names of Mr. Rajaram and Prated. The detailed horoscope was prepared two years after the birth of the appellant, but it describes him as the son of his natural father and there is no reference to adoption except in the passage which has been especially translated. This passage predicts evil to the adoptive father eight years after the appellant's birth, and it is difficult to avoid the conclusion that it was prepared after the death of Mahipat Rao. Although a deed of adoption, or a formal written record of the fact of adoption, may have to be carefully scrutinised if forgery is alleged, it is certainly remarkable that in such a case as the present no deed or other formal written record can be produced which gives any support to the claim made on behalf of the appellant. This Board in the case of *Sootrugan* v. *Sabitra* [1] said—

> "Although neither written acknowledgments, nor the performance of any " religious ceremonial, are essential to the validity of adoptions, such acknowledg- " ments are usually given, and such ceremonies observed, and notices given of the " times when adoptions are to take place, in all families of distinction, as those " of Zamindars or opulent Brahmins, that wherever these have been omitted, it " behooves this Court to regard with extreme suspicion the proof offered in support " of an adoption. I would say, that in no case should the rights of wives and " daughters be transferred to strangers, or more remote relatives, unless the proof " of adoption, by which that transfer is effected, be proved by evidence free from " all suspicion of fraud, and so consistent and probable as to give no occasion for " doubt of its truth."

It is an additional factor that no feast is proved to have taken place on the occasion of the adoption, that the ceremonies,

1. (1834) 2 Knapp 287.

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said to have been performed, were of the briefest possible description, that no form of notification was made to the authorities, that the child's name was not changed, and that he was never taken to live with his new family or recognised by them in any way. It is not too much to say that not only do their Lordships find no act or document to support the claim of the appellant, but that, on the contrary, all the surrounding circumstances and conditions point in the opposite direction and make it highly improbable that Mahipat Rao did adopt the appellant at the alleged date.

Their Lordships have carefully considered the oral evidence and have come to the conclusion that, having regard to the conditions and circumstances already mentioned, it is quite insufficient to support the case of the appellant. They agree with the view of the Judicial Commissioner and think it is unnecessary to analyse the evidence in detail. There are, however, two witnesses of special importance. Indraraj and Mr. Rajaram. Much reliance was placed upon the evidence of Mr. Rajaram, but in reality it gives no support to the appellant's claim. Mr. Rajaram knew Indraraj, but did not remember to have seen Mahipat Rao except on one or two occasions in Fulchur. He remembered going to Fulchur from Gonda on one occasion, and sat in the mandap which was erected for receiving guests for some ceremony. He was received by Mahipat Rao, but cannot recollect whether he said to him that he had a mind to adopt the appellant, or that he had adopted him. He was present about half an hour, and no ceremony of any kind was performed in his presence. He did not consider the talk of any importance to him in his private or official capacity. He is not prepared to contradict Mahipat Rao if he said that he merely intended to adopt the plaintiff, but that there was no form or complete adoption. It is on this evidence that the District Judge appears largely to base his opinion that the appellant had been adopted by Mahipat Rao, but their Lordships cannot attach the same weight and importance to it, and consider it to fall far short of the requirements necessary to establish the fact of adoption when there is no deed or formal written document, and all the surrounding facts point to a different conclusion.

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The inconsistencies in the case put forward on behalf of the appellant, are attempted to be explained on the view that Mahipat Rao was in the first instance very desirous to adopt the appellant, and that he subsequently changed, or was persuaded to change, his opinion. This theory of the attitude of Mahipat Rao runs through the evidence of Indraraj, but there is nothing to corroborate his evidence or to give it probability. He says that on the next day, after the Barsa ceremony, he came to know that Mahipat Rao wanted to adopt the plaintiff, and that on his refusal, Mahipat Rao was displeased, and began to make preparations to leave the next day, and that, consequently, after consultation with his relatives, he came to the conclusion that there was no harm in giving this boy in adoption, that the adoption took place the same or the next day, and that Mr. Rajaram was present. There is no doubt that it was the interest of Indraraj that the appellant should be adopted as the son of Mahipat Rao, and heir to the Hatta Zamindari, and if the adoption took place that it should take place under conditions which would not lead to subsequent doubt and dispute. It appears not only that no such precautions were taken, but that there is no explanation of the haste with which the alleged ceremony is said to have been performed or the absence of all formal record of so important an event. The remainder of his evidence is equally unsatisfactory. The incidents of the ceremonial visit to Hatta are not believed in either Court, there is no explanation of the continued residence of the appellant at the home of his natural father, or of the removal of the first hair of the boy in the temple of Pinglai at Bhandara, or of the arrangements for his marriage which Mahipat Rao declined to attend.

In August 1902 Indraraj went to Nagpur when Mahipat Rao attended a meeting of the Police Commission. He admits that, while at Nagpur, he heard from Sir A. Fraser, Mr. Craddock and Mr. Laurie that Mahipat Rao denied the adoption of the appellant, and there is no doubt that at this time Mahipat Rao's attitude had raised a serious question in the mind of Indraraj, but he took no steps to establish the fact of adoption. Their Lordships are not satisfied of the accuracy of the account of Indraraj's interview with Mahipat Rao on his return from Nagpur. Their Lordships have already referred to the letter

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said to have been written by Kelkar and its production does not tend to make the evidence of Indraraj more trustworthy. It is said that Indraraj is an Honorary Magistrate who has received from Government the title of Rao Bahadur, and that it is unlikely that such a person would bring a false case into Court. Their Lordships do not forget this consideration, but are unable to come to any other conclusion than that the evidence of Indraraj cannot safely be relied on and that it is not so free from all suspicion of falsehood and so consistent and probable in itself that it can be accepted as establishing the claim of the appellant, either of itself, or in conjunction with the other evidence adduced on the appellant's behalf.

In the result their Lordships agree with the conclusion of the Judicial Commissioner and will humbly advise His Majesty that the appeal be dismissed. Indraraj Bhau must personally pay the respondents' costs.

Solicitor for the Appellants :—*Edward Dalgado.*

Solicitors for the Respondents :—*Latteys and Hart.*

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Alluvion and Diluvion—*Reformation in situ—Limitation—Burden of proof—Dispossession—Exclusive adverse possession—Indian Limitation Act,* (*Act XV of* 1877)—*Section* 2 *and Schedule* 2, *Arts*, 142, 144.

A chur which was found to be a reformation in situ of plaintiff's land was occupied for some years by Government. It was then claimed by defendants as their property, and Government made over possession to them. On plaintiffs suing to recover possession, defendants pleaded limitation and to make out their plea claimed to tack on to their own occupation the period of Government's possession.

Held, that the defendants did not derive their liability to be sued "from or through" the Revenue authorities within the meaning of S. 2 (4) of the Indian Limitation Act and that their plea must fail.

The Limitation Act of 1877 does not define the term "dispossession," but its meaning is well settled. A man may cease to use his land because he cannot use it, since it is under water. He does not thereby discontinue his possession : constructively it continues, until he is dispossessed ; and, upon the cessation of the dispossession before the lapse of the statutory period, constructively it revives. "There can be no discontinuance by absence of use and enjoyment, when the land is not capable of use and enjoyment." It seems to follow that there can be no continuance of adverse possession, when the land is not capable of use and enjoyment, so long as such adverse possession must rest on *de facto* use and occupation. When sufficient time has elapsed to extinguish the old title and start a new one, the new owner's possession of course continues until there is fresh dispossession, and revives as it ceases.

Leigh v. *Jack*, (1879) L. R. 5 Exch. Div. at p. 274. Followed.

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In Burmese Buddhist law the eldest (aurasa) son is on his father's death entitled to a definite one-fourth of the estate as against his mother and the other children, and so long as his mother lives, is at liberty to assert his right within the period allowed by Article 123 of the Indian Limitation Act for a suit for a distributive share of the property of an intestate.

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On the true construction of S. 341 (3) of the Calcutta Municipal Act, the assessment of compensation is not a condition precedent to the demolition of structures.

Under S. 617 of the Calcutta Municipal Act, the only Court competent to fix the compensation in cases of dispute is the Court of Small Causes; and the question is not cognisable by any other courts.

Where the plaintiffs sued for a declaration that certain structures were affixed before the first of June 1863, that they were entitled to compensation and many other reliefs and the defendants denied the claim to a substantial portion of the structures and the Court of first instance decreed the suit in its entirety and the defendants appealed to the High Court, and at the hearing of the appeal, the defendants admitted that the structures were put up before the 1st of June 1863 but contested the granting of the other reliefs, and the High Court proceeded on the admission but found that the other reliefs could not be granted, and dismissed the plaintiff's suit.

Held, the High Court ought to have incorporated the admission in their decree instead of merely referring to it in their judgment and there should also be a declaration that the plaintiffs were entitled to be paid reasonable compensation.

Joseph v. *The Corporation of Calcutta* (*Lord Buckmaster. L.C.*) *P.C.* 631

Certiorari—Writ of—Powers of High Court in respect of ... 151

Charity—Right of—Limitation—Adverse possession—Charity barred only when manager barred 85

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Civil Procedure Code. Page

Civil Procedure Code of (1882). Ss. 274, 276 and 295—*Attachment in execution of a decree—Sale by judgment-debtor of attached property—Subsequent attachment and sale of same property in execution of another decree—Rights of the private purchaser and the execution purchaser who held both decrees—Transfer of Property Act, (Act 4 of 1882) S. 53—Preferential payment to a creditor not fraudulent.*

The respondent, who was the transferee of two decrees dated 1896 and 1901 respectively, obtained in execution proceedings (Case No. 8 of 1902) in connection with the first decree, an order of attachment under S. 274 of the Code of Civil Procedure, 1882, of certain properties belonging to the judgment-debtor, but by an order dated the 20th March 1905 sale of the attached properties was indefinitely postponed and on the 29th March 1905 the execution application was dismissed with the respondent's consent. On the 15th July 1907 the judgment-debtor conveyed the said properties to the appellant by two sale-deeds. On the 26th July 1907 the respondent made another application for execution (Case No. 19 of 1907) of the decree of 1896, and in spite of the judgment-debtor's opposition it was held that this application was in continuation of the former proceedings and that the properties were still under attachment.

On the 16th July 1907 the respondent applied for execution, (Case No. 16 of 1907) of the decree of 1901. In these proceedings the said properties were attached, and notwithstanding the Appellant's opposition they were sold in execution and purchased by the respondent, decree-holder, who obtained possession thereof. The Appellant sued for recovery of possession of the same.

Held, that though the word 'attachment' occurred three times in S. 276 of the Code of Civil Procedure, 1882, the reference was to one, and only one attachment and that one in the present case was the attachment in case No. 16 of 1907, on which the respondent's title rested; that the sale to the appellant being prior to the date of that attachment was not void; and that the Appellant's suit must be decreed;

Held, also, that all that the earlier attachment in Case No. 8 of 1902 could do was to entitle the decree-holder to the benefit of the latter attachment in Case No. 16 of 1907 but he could not claim to be in a better position than the decree-holder in the latter case and his position is not strengthened by the fact that it was the same person who was the decree-holder in both cases.

A debtor for all that is contained in S. 53 of the Transfer of Property Act, 1882, may pay his debts in any order he pleases and prefer any creditor he chooses and even though a debtor has preferred a creditor of set purpose it would not stamp the transaction as fraudulent.

Mina Kumari Bibi v. Raja Bijoy Singh Dudhuria (Sir Lawrence Jenkins.) P. C. 425

———— ———— of 1908, S. 11—Res judicata—*Decision on question of law—What is—Issue of mixed fact and law—Test—" Matter " in S. 11—Meaning.*

Per *Sadasiva Aiyar, J.*:—A decision on an abstract question of law in one suit is not *res judicata* so that the law of the land should itself be deemed to have been altered when that question arises in subsequent suits between the same parties; but a legal right found, declared or awarded in favour of one of the parties in one suit though based on an

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erroneous view of the law or an erroneous construction of a document is *res judicata* when the same legal right is controverted in subsequent suits between the same parties.

Per *Napier, J.*:—Where a decision on a point of law, whether it be on the construction of a document or of a statute or on common law or on customary law settles a question that arises directly out of conflicting views as to the rights of the parties, it is *res judicata*.

The question whether an issue arising in a case is of law or is of mixed fact and law must depend on the way in which the issues are framed quite apart from the question which is really decided in the case.

Meaning of the word "matter" in S. 11, Civil Procedure Code.

The cases in *Parthasarathi Ayyangar* v. *Chinna Krishna Ayyangar* (1882) I.L.R. 5 M. 304; *Mangalathammal* v. *Narayanaswami Aiyar* (1907) I.L.R. 30. M. 463; *Natesa Chetti* v. *Vengu Nachiar* (1909) I. L. R. 33. M. 102 do not accurately express the law.

Badar Bee v. *Habib Mexican Noordin* (1909) A. C. 615 and *The Secretary of State for India* v. *Maharaja of Venkatagiri* (1916) 31. M. L. J. 97 (117), followed.

Sree Rajah Bommadevara Narasimha Naidu v. *Andavolu Venkataratnam.* (*Sadasiva Aiyar and Napier, JJ.*) 63

———S. 11—*Res Judicata*—Hindu Law—Widow—Decree against in suit under Limitation Act of 1877 on question of limitation—Reversioner's suit after her death—*Res Judicata* 627

———S. 13 (b)—Foreign judgment.—" On the merits of the case " —Meaning—Judgment given after striking out defence ... 35

———S. 24—*Small Cause Suit—Transfer to City Civil Court—Power of the Chief Justice of the High Court—Madras City Civil Court Act* (*VII of* 1892) *Ss.* 3 *and* 5 (2).

A suit pending in the Small Cause Court can be transferred to the City Civil Court only when the Chief Justice of the High Court directs the City Civil Judge to try the case in his capacity of Small Cause Court Judge.

Bagiammal In re (*The Chief Justice*) 258

———Ss. 38, 44—*Decree passed by a British Indian Court—Transmission to a Court of a native state for execution—Legality of—Settled practice on a question of procedure whether should be followed, when want of jurisdiction established*—Ex parte *order without jurisdiction —The right of party to question.*

A British Indian Court which passes a decree cannot transmit it for execution to a Court in a native state. It is a well known principle of jurisprudence, that no country can legislate for the procedure to be followed in another state. An order transmitting a decree to a native state for execution is not sanctioned by the Code of Civil Procedure. *Kasturchand* v. *Parshu Mahar* (1887) I. L. R. 12 B. 230, followed.

A long course of practice on a question of procedure can be departed from, where want of jurisdiction is established.

Where an order is passed and it is without jurisdiction, the party aggrieved is entitled when it comes to his notice to apply to vacate it, even though he has not appealed against the same.

Chidambaram Chetty v. *Ramanatham Chetty.* (*The Cheif Justice and Seshagiri Aiyar, J.*) 487

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—— **S. 47**— "*Party to suit*"—*Exonerated party if and when "party to suit"—Redemption suit—Person claiming by title paramount made party defendant—Exoneration on ground of misjoinder—Issues affecting him expressly left open—His property delivered in execution of decree—Petition by him under Or.* 21. *R.* 100—*Maintainability—Scope of enquiry in petition.*

Exoneration of a party from a suit may be due to various causes and the question whether the party remains on record for the purpose of S. 47 of the Code in spite of such exoneration will depend upon the nature and scope of the order having regard to the pleadings and the reason which led to such exoneration. The mere fact that the name of the exonerated party is not formally removed from the records pursuant to the order exonerating him will not affect the question as to whether he remains a party.

Venkatapathy Naidu v. *Subbayya Mudaly* (1907) 17 M. L. J. 416, referred to.

Where a person, who was made a defendant in a suit for redemption but who claimed an interest in the mortgaged property adverse to the mortgagor and mortgagee, was exonerated from the suit on the ground of his being an unnecessary party and the order exonerating him expressly left open the issues affecting him, *held*, that he ceased to be a party to the suit for the purpose of S. 47 of the Code, that a petition filed by him under Or. 21, R. 100 thereof objecting to the delivery in execution of the decree in the suit for possession of his property was quite competent and that the executing Court ought not on such a petition to go into the question of the title of the petitioner but must confine itself to the main question of possession and dispossession.

Krishnappa Mudali v. *Periasami Mudali.* (*Ayling and Kumarasami Sastri, JJ.*) 582

—— **S. 47. and O. 21, R. 2**—*Agreement between parties to a suit that one of them should submit to a decree, with a private arrangement for the discharge of the decree within a certain date and that the other party should not within that date execute or transfer the decree—Decree passed in the suit—Application for execution within the time fixed in the agreement—Whether the agreement can be pleaded in execution*—Stare decisis *in processual law.*

Where the parties to a suit enter into an agreement by which one of the parties agrees to submit to a decree to be pased in the suit under an arrangement for the discharge of the decree in a particular manner within a certain date and that the other party should not within that date execute or assign the decree and a decree is consequently passed in the suit and the decree-holder seeks to execute the decree within the time fixed in the agreement and the judgment-debtor pleaded the agreement in opposition, in execution proceedings.

Held, by *Abdur Rahim. Offg. C.J.*, and *Seshagiri Aiyar, J.* (*Phillips, J.* dissenting) that such an agreement can be given effect to in execution proceedings under S. 47 of the Code so as to operate as a stay of execution of the decree.

Per *Phillips, J.*—The omission of the words "and stay of execution" in S. 47 of the Code of 1908 is deliberate and such an agreement cannot be given effect to in execution so as to operate as a stay of execution of

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the decree. A decree of Court should be executed as it stands and the executing Court cannot go behind its terms and give effect to private arrangements excepting those falling under O. 21, R. 2, and O. 20, (2) of the Code. A further ground for excluding such an agreement from consideration in execution proceedings is that the conduct of the parties amounts to an abuse of process of the court, for they have collusively induced the Court to pass a decree, which according to their agreement was never to have effect.

Per *Curiam.*—An agreement to constitute an adjustment of the decree within the meaning of O. 21, R. 2 of the Code should be subsequent to the decree.

Per *Seshagiri Aiyar, J.*—In matters of procedure, the principle of consistency will conduce to justice more than a strict adherence to logic; and Courts should not upset a practice which has been prevalent for a long period of time in the presidency.

Per *Phillips, J.*—The principle of *Stare decisis* need not be too strictly applied to questions of procedure, because an alteration in procedure does not materially affect substantive rights, but only the method of enforcing them.

Chidambaram Chettiar v. *Krishna Vathiyar.* (*Abdur Rahim, Offg. C. J., Seshagiri Aiyar and Phillips, JJ.*) *F. B.* 18

———**Ss. 73 and 115**—*Rateable distribution—Application for rateable distribution—Whether Court can inquire into the validity of the decree—Nature of the function exercised by the Court in ordering rateable distribution—Interference by the High Court under S. 115, Civil Procedure Code.*

Under S. 73 of the Civil Procedure Code, it is not competent to a Judge to inquire into the validity of a decree on the strength of which rateable distribution is claimed.

The officer distributing the assets under S. 73 of the Code is only acting ministerially and is not acting in the performance of judicial functions.

In the case, their Lordships interfered under S. 115 of the Civil Procedure Code against an order of the District Munsiff inquiring into the *bona fides* of the decree obtained by the petitioner in an application by him for rateable distribution.

Saravana Pillai v. *Arunachellam Chettiar.* (*Ayling and Seshagiri Aiyar, JJ*) 553

———**S. 100**—Second Appeal—Question of fact—Question whether particular writing is defamatory of particular man—Question as to quantum of damages 392

———**S. 100 cl. (a)**—Second Appeal—High Court—Jurisdiction to consider evidence in proof of custom 237

———**S. 107 (2) and O. 23, R. 1** — *Leave to withdraw with liberty to file fresh suit—Power of Appellate Court to grant.*

It is open to an Appellate Court in proper cases when reversing the decree of the lower Court to give the plaintiff leave to withdraw the suit with liberty to file a fresh suit.

Balide Kamayya v. *Pragada Papayya.* (*The Chief Justice, Abdur Rahim and Srinivasa Aiyangar, JJ.*) *F. B.* 477

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——**S. 110**—*Appeal to Privy Council—Final decree involving indirectly question respecting property of the amount or value of Rs.* 10,000 *—Suit for a legacy under a will—Value of legacy less than Rs.* 10,000 *—Source from which legacy payable—Decision becoming an authority in the case of other legacies—Appealability to Privy Council.*

Where the High Court gave a decision which related to the source from which a legacy of less than Rs. 10,000 in value was payable, the fact that the decision may be relied on as an authority in the case of other legacies under the will, though not as an estoppel, does not render the decision appealable under S. 110 of the Civil Procedure Code as indirectly involving a claim or question respecting property over ten thousand rupees in value. A claim for a smaller sum could be said to involve indirectly a claim or question relating to property over ten thousand rupees in value, when the smaller decree has the effect of estopping either by the rule of *res judicata* or otherwise the party from claiming rights under the larger claim.

Rajamannaru v. *Radhakrishnaya*, (*Oldfield and Seshagiri Aiyar, JJ*). 400

——**S. 115**—Interference under, with order under S. 476, Cr. P. C.—High Court—Powers of—Practice 406

——**Or. 1 R 3 and Or. 2 Rules 3 and 4**—Hindu Law—Joint family—Agreement by member to sell his share—Suit for specific performance and for partition and possession of share—Maintainability—Other members if and when proper parties (F. B.) 575

——**Or. 6 Rules 16, 17**—Plaint—Amendment—Failure of party to make, within the specified time— ejection of plaint—Legality—Duty of Court (F. B.) 575

——**Or. 21 R. 2**—Decree—Adjustment—Meaning—Agreement prior to decree and providing mode of its satisfaction—Validity ... 13

——**Or. 21, R. 100**—Petition under—Scope of enquiry in ... 592

——**O. 23, R 1**—*Withdrawal with liberty—Order granting permission if and when a nullity—Subsequent suit for same claim if barred by* res judicata—*Orders passed without jurisdiction and irregular orders—Distinction—Collateral attack.*

Where a suit was as regards a portion of the claim allowed to be withdrawn with liberty to sue again, and it was contended that the subsequent suit thereto was barred by *res judicata* reservation of liberty to sue in the circumstances being improper, *held*, that there being no decision on the portion of the claim withdrawn there was no bar by *res judicata*.

Parsotam Gir v. *Narbada Gir* (1899) L R 26 I. A 175. foll.

Quaere, whether an order granting permission to withdraw with liberty on an erroneous construction of the provisions of law which give the power can in a subsequent proceeding be treated as a nullity by the party dissatisfied with the order without its being vacated by him by proper proceedings.

The true rule is that if a Court has jurisdiction to pass orders of a particular kind, that in a particular case it passed an order which it should not have passed is not a case of total want of jurisdiction so as to render that order a nullity.

Tuljaram Row v. *Gopala Aiyan*. (*Abdur Rahim and Srinivasa Aiyangar, JJ.*) 424

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———**O. 37**—*Summary procedure—Suit on pro-note and decree therein —Order setting aside decree on condition of deposit of security for satisfaction of decree that may be passed against defendant—Money deposited as security—Charge on, for decree amount—Distinction in case of security of specific property such as land.*

Where the decree in a suit on a promissory note under the summary procedure prescribed by O. 37 of the Code of Civil Procedure is ordered to be set aside on condition of the defendant depositing security for satisfying any judgment that may be passed against him, the decree amount must be regarded as being charged on money deposited as security in pursuance of the order and the Court cannot hold an enquiry as to whether the amount so deposited really belongs to the defendant or not.

Quære:—Whether a case in which specific property such as land is furnished as security will stand on a different footing.

In re Ford: Exparte, The Trustee (1900) 2 Q. B. 211 and *Bird* v. *Barston* (1892) 1 Q. B. 94 followed.

Errikullappa Chetty v. *Official Assignee, Madras* (1915) 32 I C 190 distinguished.

Gopalaiyar v. *Tiruvengadam Pillai* (*Abdur Rahim and Oldfield, JJ.*) 503

———**Or. 40, R. 1 and O. 43, R. 1 (S)**—*Order for appointment of receiver, before a particular person is selected and appointed as such, if appealable.*

Held, by the Full Bench (Spencer, J. dissenting):—

An order determining that it is just and convenient to appoint a receiver (*i e.,*) an order for the appointment of a receiver and before a particular person is selected and appointed as such receiver, is one under O. 40, R. 1 and is therefore appealable under O. 43, R. 1 (S) of the Code of Civil Procedure.

Venkatasami v. *Stridevamma* (1887) I. L. R. 10 M. 179 *applied. Upendra Nath Nag Chowdry* v. *Bhupendra Nath Nag Chowdry* (1910) 13 C L J 157. *Srinivasa Prasad* v. *Kesho Prasad* (1911) 14 C L J 489 dissented from.

Per Spencer, J.—An appeal is premature if preferred before a receiver has been appointed by name, for the reason that until that is done the order is merely interlocutory and does not completely dispose of the petition to appoint a receiver.

Palaniappa Chetty v. Palaniappa Chetty. (*Abdur Rahim, Spencer and Srinivasa Aiyangar, JJ.*) *F. B* 304

Company—*Limited liability—Liquidation — Share-holder indebted to company—No right to set off paid up calls on his shares against the debt.*

Under the rules of a company with limited liability a share-holder with 5 shares was entitled to a sum of Rs. 500 on payment of Rs. 5 every month for a period of 84 months. In August 1910 the share-holder borrowed Rs. 500 from the company on mortgage of the suit properties, undertaking to pay the interest on the principal sum every month. The share-holder paid the subscription on his shares as well as the interest on the mortgage money till August 1913 and sold the mortgaged properties to plaintiff. in April 1914. The company went into liquidation in May 1914. In 1915, plaintiff sued for redemption of the suit properties on

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payment of the mortgage money less the amount paid by the share-holder towards his shares. The rules of the Fund did not provide for any such appropriation.

Held, that the plaintiff was bound to pay the whole of the mortgage debt and that he was not entitled to deduct therefrom the amounts paid by the share-holder towards his shares.

Grissel's Case (1866) 1 Ch. A. 528; *Black and Co.'s Case* (1872) 8 Ch. A. 254 ; *Hiram Maxim Lamp Co., In re.* (1903) 1 Ch. 70. Referred to. *The Mylapore Permanent Benefit Fund Ltd.* v. *Arogiasami Pillai* (*Ayling and Seshagiri Aiyar, JJ.*) 528

Contract of sale of real property—*English rule that purchaser is equitable owner not applicable to those parts of India where the Transfer of Property Act is in force—Date from which purchaser is entitled to rents and profits and vendor to interest on purchase money, how fixed —Transfer of Property Act*, 1882 (*Act IV of* 1882) *S*. 54.

The principle of English law, that a contract for sale of real property makes the purchaser the owner in equity of the estates has no application to those parts of India where the Transfer of Property Act, 1882 (Act IV of 1882) is in force.

Semble, that the English rule based on such principle, by which the purchaser, when no date is fixed by the contract, is deemed to be entitled to the rents and profits and is liable for interest on unpaid purchase-money as from the time when he is or should be satisfied as to the vendor's title, is equally inapplicable.

But in this particular case the point was not decided, as it was held that the contract itself provided from what date the purchaser's ownership should begin. *Maung Shwe Goh* v. *Maung Inn.* (*Lord Buckmaster, L. C.*,) *P. C.* 6

Contract to sell immoveable property — *Manager of a joint Hindu family—Not binding on junior members—Personal liability of manager for damages for breach of contract—Indian Contract Act, S.* 73—*The Rule in Bain* v. *Fothergill, applicability of to India—Transfer of Property Act, S.* 55 (2).

The manager of a joint Hindu family who has agreed to sell immoveable property belonging to himself and the minor members of the family is personally liable for failure to perform the contract when it is found that it is not binding on the minors, though both the contracting parties believed there was necessity and acted in good faith.

S. 73 of the Contract Act lays down the law in India as to the liability for damages for breach of contract, whether the contract was one which related to the sale of moveable or immoveable property.

The rule of law laid down in *Flureau* v. *Thornhill* (1776) 2 W & Bl. 1078, *and Bain* v. *Fothergill* (1874) L R 7 H L 158 by which a person who enters into a contract for the sale of a real estate knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred by an action for breach of contract, does not apply to India.

Ranchhod v. *Manmohandas* (1907) I L R 32 B. 165 ; *Nabin Chandra Saha Paramanick* v. *Krishna Barana Dasi* (1911) I L R 38 C 458, foll.

Contract to sell immoveable property—*Contd.* Page

The law laid down in *Gaslight & Coke Co.* v. *Towse* (1887) L R 35 Ch. D. 519 is not applicable to this country.

Per *Abdur Rahim, J.*, (*Sadasiva Aiyar, J.*) contra, Sec. 55 (2) of the Transfer of Property Act applies not only to cases where there has been a completed sale, but also when the parties have only entered into an agreement to sell.

Adikesavan Naidu v. *Gurunatha Chetti.* (*Abdur Rahim, Sadasiva Aiyar and Napier, JJ.*) F. B. 180

Contract Act, S. 15—"Act forbidden by Penal Code"—Meaning ... 494

———**S. 15**—*Coercion—Contract entered into by a Hindu wife under threat by her husband that he would commit suicide—Whether voidable.*

Where a Hindu threatened that he would commit suicide if his wife and son would not execute a deed in his favour and they in consequence executed the document.

Held, per *The Chief Justice* and *Seshagiri Aiyar, J.*, (*Oldfield, J., dissenting*) the deed was entered into under "coercion" within the meaning of S. 15 of the Contract Act, suicide being an act forbidden by the Indian Penal Code.

Per Oldfield, J. S. 15 of the Indian Contract Act should be construed strictly.

A threat to commit suicide is not an attempt to commit suicide in the legal sense of the term. A prohibition to commit suicide inferred from the fact that attempts to commit suicide are prohibited by the Indian Penal Code, cannot be taken into consideration in construing S. 15 of the Contract Act, as the section has to be construed strictly.

Chikkam Ammiraju v. *Chikkam Seshamma.* (*The Chief Justice and Seshagiri Aiyar and Oldfield, JJ.*) 494

———**Act IX of 1872, S. 25**—"*Debt*", *meaning of—Amount which might be found due on taking accounts, not a "debt".*

A promise to pay the amount which might be found due by an arbitrator on taking accounts between the parties is not a promise to pay a "debt" within the meaning of S 25 of the Contract Act.

" The word debt" in the section is used in its ordinary meaning of a sum payable in respect of a money demand recoverable by action.

Observations of Subramaniya Ayyar, J.. in *Subju Sahib* v. *Noordin Sahib* (1899) I L R 22 M 139, ref. to.

Doraisami Padayachi v Vaithilinga Padayachi (*The Chief Justice, Abdur Rahim and Srinivasa Aiyangar, JJ.*) 422

———S. 41—Contract—Discharge—Acceptance of performance by third party—Effect where contract not performed by third party ... 241

———S. 56—Contract—Performance becoming impossible or unlawful—Meaning—War—Effect on contracts entered into before its outbreak. 146

———Ss. 69, 70—" Bound by law"—Meaning 347

——— S. 73. Hindu Law—Joint Family—Manager—Contract to sell—Breach—Personal liability for damages 180

Co-Sharer—Default to pay his share of Government revenue-sale of estate in consequence—Purchase of estate for his own benefit—Purchaser in trust for other sharers 205

Court Fees Act. Page

Court Fees Act, S 7.iv (c)—*Suit for declaration that a sale by Official Receiver is invalid and for the appointment of a fresh receiver and to make over properties to him—Declaration valued for jurisdiction at a large amount—Court fee for Rs. 10 paid thereon—Ad valorem Court fee on other reliefs—Proper court fee paid on the plaint.*

Where the plaintiff, an insolvent, instituted a suit claiming mainly 2 reliefs, (1) a declaration that certain sales made by the Official Receiver of his properties were not valid (2) that a fresh receiver should be appointed and the properties made over to him and he valued the declaration for the purpose of jurisdiction at Rs. 38,000 and paid a Court fee of Rs. 10 on it, and he valued the second relief at Rs. 100 and paid an advalorem court fee of Rs. 7 as. 8 on it.

Held, the proper Court fee on the plaint was paid by the plaintiff and ad valorem court fee on Rs. 38,000 need not be paid.

Ramaswamy Nadan v *Subramania Nadan* (*Abdur Rahim and Srinivasa Aiyangar, JJ*). 447

Criminal Procedure Code, S. 195—*Sanction to prosecute—Grant of—Principles — Duty of court to which application is made—Object of section—Observations on—Appellate Court setting aside order of court below granting sanction.*

As a rule, if the court whose sanction is applied for is of opinion that a man has committed the offence in respect of which sanction is applied for and can be prosecuted with a fair chance of success, it will be desirable that justice should be vindicated. But exceptional cases will occur in which a prosecution may possess every chance of success and yet be undesirable, *e.g.*, where the moral turpitude is very slight the offender may have already suffered sufficiently or other considerations may intervene. In such cases, a court might prudently and properly refuse sanction. A court may properly refuse sanction where it considers that a prosecution is not desirable in the public interest.

The court whose sanction is applied for need not confine its attention to evidence already legally on record. It may fairly and reasonably take other circumstances into consideration, and in particular the probability of other evidence being adduced at the trial.

Per *Seshagiri Aiyar, J.* Care should be taken to see that in the order granting sanction conclusions are not stated which may prejudice the accused.

Palaniappa Chettiar v. Ramaswami Chettiar, (*Ayling and Seshagiri Aiyar, JJ.*) 14

———S. 250—*Case instituted upon complaint—Meaning—Prosecution launched as result of information given to village Magistrate— Discharge of accused—order for compensation as against informant — Validity—Magistrate if includes Village Magistrate.*

Under S. 250 of the Code of Criminal Procedure a Magistrate can, when discharging the accused, order compensation to be paid to him by the person who gave information to the Village Magistrate as the result of which the prosecution was launched.

Machimuthu Chetty v. *King Emperor*, 1914 M W N 804 followed.

Semble, The term "Magistrate" in S. 250 does not include Village Magistrates.

Gandla Nadiabba v. Margasahaya Chetty. (*Oldfield and Krishnan, JJ.*) ... 78

Criminal Procedure Code.—*Contd.*

——Ss. 350, 366 and 367—*Judgment written, signed and dated by one Magistrate—Successor's obligation to deliver it—His right to do so—Accused's demand for* de novo *trial—Effect—Delivery of Judgment—What amounts to.*

Whether or not the accused demands a *de novo* trial, a Magistrate is not bound to deliver a judgment written, signed and dated by his predecessor but not pronounced by him in open Court. *Sankara Pillai in re* (1908) 18 M. L. J. 197 distinguished.

In the absence of any demand for a *de novo* trial it would have been in his discretion to do so.

Quære, whether it would have been legal for him to do so in the face of a demand for a *de novo* trial.

Under Ss. 366 and 367 of the Code a judgment is not delivered till it is written, signed, dated and pronounced in open Court.

Savirimuthu Pillai v. *Muthu Pillai.* (*Ayling and Napier, JJ.*) ... 81

——S. 476—*Judicial proceedings—Legal Practitioners Act (XVIII of 1879) S. 14—Enquiry by District Judge into conduct of Second Grade Pleader in connection with execution proceedings in a Small Cause suit—False statement in the course of such enquiry—Proceedings under S. 476, if can be started—Indian Penal Code, Ss.* 191 *and* 193 *—Suggested amendment of—Government of India Act,* 1915, *S.* 107—*Powers of interference under.*

A District Judge taking evidence in a proceeding of which he is entitled to take cognizance under the Legal Practitioner's Act is a "court" and the enquiry is a "judicial proceeding" within the meaning of S. 476 of the Criminal Procedure Code.

Where a Second Grade Pleader practising in courts subordinate to the District Court, is charged with unprofessional conduct in connection with proceedings in execution of a decree of a small cause court, it is beyond the jurisdiction of a District Judge to hold an enquiry under S. 14 of the Legal Practitioners Act into the conduct of the pleader. If in the course of such an enquiry by the District Judge, a witness is believed to have given false evidence, proceedings under S. 476 of the Criminal Procedure Code cannot be initiated against him.

Desirability of widening the scope of Ss. 191 and 193 of the Indian Penal Code, pointed out.

It is only in very exceptional cases that the High Court will interfere, in the exercise of its powers under S. 107 of the Government of India Act or under S. 115 of the Code of Civil Procedure, with an order of the lower court passed under S. 476 of the Criminal Procedure Code.

Nallasivan Pillai v. *Ramalingam Pillai.* (*Sadasiva Aiyar, J.*) ... 402

Criminal Tribes Act, 1911—S. 23, Sub-sec. (1)—Cl. (a) "*Second conviction*"—*Cl.* (*b*) "*third conviction*"—*Meaning.*

The words "second conviction" in Cl. (a) of Sub-sec. (1) of S. 23 of the Criminal Tribes Act, 1911, signify a first conviction for a scheduled offence after the coming into force of the Act following upon either one or many convictions of scheduled offences prior to the Act and the words "a third conviction" of Cl. (b) signify a second conviction so following.

The words "second conviction" in Cl.(a) do not mean a second conviction after the notification.

Sellamani In re. (*Ayling and Napier, JJ.*) 212

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Deed—*Construction—Evidence of intention of parties not admissible—Privy Council—Practice—Fresh Point.*

In construing the terms of a deed evidence of the intention of the parties thereto is inadmissible : the question is not what the parties may have intended, but what is the meaning of the words which they used.

On appeal to the Judicial Committee, in the absence of any exceptional conditions, it is not open to a party to raise a fresh point, which though raised in the pleadings and in the reasons attached to his case lodged in the Privy Council, was not raised at the hearing either in the original Court or in the first appeal.

Durga Prasad Singh v. *Gosta Behari Nandi* (1912) 17 C. L. J. 53 affirmed.

Maharajah Manindara Chandra Nandi v. *Durga Prashad Singh.* (*Lord Parmoor*) *P. C.* 559

Defamation—*Suit for damages—Question whether writing is defamatory of plaintiff—Quantum of damages—Questions of fact—No interference in second appeal—Professional Etiquette—Duty of Counsel in accepting and conducting cases.*

The question whether a letter published in a newspaper is defamatory of the plaintiff or which portion of it is defamatory is one of fact on which the High Court in second appeal is bound by the findings of the Lower Appellate Court.

The *quantum* of damages awardable to the plaintiff in an action for libel is also a question of fact.

Observations of *Sadasiva Aiyar, J.* on the value of English decisions on the law of libel, as precedents for Indian Courts and on the duty of counsel in accepting and conducting cases.

Houlton v. *Jones,* (1910) A. C. 20 ref.

Naganatha Sastri v. Subramania Iyer. (*Sadasiva Aiyar and Spencer, JJ.*) 392

Discovery—*Account Books—Failure to produce and account for them—Presumption.*

Where it is the business of a party to a suit to produce or account for books of account relevant to an issue, and, in spite of an order for discovery made on the party, he neither produces them nor gives any evidence of dilligent search and of failure to find the books, even if the fact and date of their destruction, connot be proved, the presumption arises that the contents of the books, not accounted for are, as regards the issue in dispute, unfavourable to that party.

Moti Lal v. *Kundan Lal.* (*Lord Sumner*) *P. C.* 468

English Law—Contract for sale—Effect—Purchaser's rights—English equitable rule—Applicability to cases governed by S. 54 Transfer of Property Act 6

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Ex parte Cases—Duty of counsel in 206

Foreign judgment—*Judgment on the merits of the case—Foreign judgment in favour of Plaintiff on defendant's omitting to answer interrogatories—Not a judgment on the merits—Not enforceable in India—Code of Civil Procedure,* 1908, *S.* 13 (*b*).

Where a plaintiff was given liberty in an action before the High Court of Judicature in England to exhibit interrogatories and on the defendant's omitting to answer such interrogatories his defence was struck out and plaintiff allowed to sign judgment against him.

Held, that such judgment was not a judgment "given on the merits of the case" within the meaning of S. 13 of the Code of Civil Procedure, 1908, and that in consequence no action could be maintained on it in the Indian Courts.

S. 13 (b) of the Code of Civil Procedure refers to those cases where the controversy raised in the action has not been the subject of direct adjudication by the Court.

Keymer v. Viswanatham Reddi. (*Lord Buckmaster, L. C*) P. C. 85

Fraudulent benami transfer—*Fraud carried out—Transferee's suit for possession under the transfer—Plea of benami character of transaction—Sustainability.*

A person who has conveyed property benami to another for the purpose of effecting a fraud on his creditors cannot, where the fraud has been effected, set up the benami character of the transaction by way of defence in a suit by the transferee for possession under the conveyance.

Doed Roberts v. *Roberts* (1819) 2 B and Ald. 368 followed.

Kamayya v. *Mamayya* (*The chief Justice and Coutts Trotter J.*) ... 484

Government of India Act S. 107—Interference under, with order under S. 476 Criminal Procedure Code—High Court—Power of. 402

Grant— Talabi Brahmottar grant prior to 1790—Construction—Grantees' right to minerals 245

High Court—*Appeal under Cl.* 15 *of the Letters Patent—Power to review—Practice of the Court.*

The High Court has power to entertain a review in appeals prefrerred under Cl. 15 of the Letters Patent.

Hafiz Muhammad Moshin v. *Sheo Prasad* (1904) 1 A. L. J. 509 ref. to *Ravi Veeraraghavalu* v. *Venkatanarasimha Naidu Bahadur* (1913) I. L. R. 37 M 443; 27 M. L. J. 451 ref. to.

In a matter like this, the practice of the court should not be lightly departed from, though not warranted by a strict construction of the law.

Attyam Venkatasubbarayadu V Sri Rajah Velugoti Govinda Krishna Yachendrulu (*Seshagiri Aiyar and Phillips JJ.*) 144

Hindu Law—Adoption—Authority to adopt—Construction—Principles—Adoption by widow without attempting to follow instructions of husband—Validity 47

———*Adoption—Proof—Absence of deed of adoption or other written record—No entries of expenditure on ceremonies in account books.*

When there is no deed of adoption, or other formal written record, when the ceremonies said to have taken place were of the briefest possible description and when the child's name was not changed and he was never taken to live with his new family or recognised by them in any way, it is highly improbable that the adoption took place.

Hindu Law—*Contd.* Page

Having regard to the habits of the Indian people with regard to the keeping of accounts regarding their most minute transactions, the absence of any reference to expenditure on the ceremony of adoption in the accounts either of the natural or of the adoptive father covers an alleged adoption with suspicion.

Diwakar v. *Chandanlal* (*Lord Parmoor*) *P. C.* 686

———*Adoption by widow of eleven years of age under authority from her deceased husband—No exercise of discretion—Absence of disinterested advice from guardian—Adoption void—Ratification, if possible.*

Where a Hindu widow of about eleven years of age who had been authorised by her husband's will to adopt, if and when she chose, purported to adopt a boy and it was found that she exercised no discretion in the matter of adoption and at her age at the time, was incapable of exercising any discretion and that her father who acted as her guardian did not give disinterested advice in the matter of adoption, *Held*, that the adoption was void and was incapable of being validated by subsequent ratification.

The authorities on the point discussed.

Per Curiam—The age of majority for both males and females under the Hindu Law commences at the age of 16, that is, on the completion of the 15th year.

Per Sadasiva Aiyar, J.—According to Hindu Law, a widow has not got the legal discretion to adopt a boy to her husband before she finishes the 15th year of her age.

Where it is left to the sole discretion of a widow to adopt, her discretion could not be displaced by her guardian's advice, however disinterested.

Kovvidi Sattiraju v. *Patamsetti Venkataswami.* (*Oldfield and Sadasiva Aiyar, JJ*). 119

———Adoption of husband's natural younger brother-Validity-custom —Effect. 47

———Guardianship—Right of mother during father's lifetime ... 364

——— Joint-Family—Agreement by member to sell his share—Purchaser's rights 575

———Joint-Family—Agreement by member to sell his share in certain items—Subsequent partition between members of family-Binding nature of, on purchaser—Condition 575

———Joint Family—Contract for sale of member's share—Suit for Specific performance—Parties—Joinder of other members—Addition of prayer for partition—Propriety—C. P. C Or 1 R 3; Or 2 Rules 3 and 4 —Specific Relief Act S. 27—Effect 575

———Joint Family—Decree against father—Execution sale of right, title and interest of father in family property—Extent of purchaser's estate 133

———*Joint Family—Father—Power to make a gift of ancestral property in favour of female members of the family—Family settlement—Will—Consent of adult sons—Minors, if bound—Mother not legal guardian of infant, when father is alive.*

In a joint Hindu family it is competent to the father with the consent of his adult sons and with the consent of relations who are interested in his minor sons, to make fair and reasonable provisions by will in favour of the female members of his family.

Hindu Law—*Contd.* Page

Brijraj Singh v. *Sheodan Singh* (1913) I L R 35 A 337, 346 ; *Kudutamma* v. *Narasimhacharyalu* (1907) 17 M L J 528 ; *Anivillah Sundararamaya* v. *Cherla Seethamma* (1911) 21 M L J 695 ; *Arunachala Pillai* v. *Sampurnathachi* (1915) 27 M L J 485 Relied upon.

The mother is not the legal guardian of a Hindu infant so long as the father is alive.

Appan Patrachariar v. *Srinivasachariar* (*Sadasiva Aiyar and Spencer, JJ.*) 364

———Joint Family — Manager—Contract to sell—Breach—Personal liability for damages 180

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——— *Mitakshara—Execution sale under decree against father—Sale of 'right, title and interest' of judgment-debtor—What passes under such sale.*

By the Mitakshara Law a judgment against the father of the family can be executed against the whole of the Mitakshara property in every event but one, *viz.*, that the debt in respect of which the judgment has been obtained was a debt incurred for illegal or immoral purposes

The presence of the words "right, title and interest" of the judgment-debtor in a sale certificate is consistent with the sale of every interest which the judgment-debtor might have sold, and does not necessarily import, when the father is the judgment-debtor, that nothing is sold but his interest as a co-sharer. In cases of this kind the substance and not the mere technicalities of the transaction should be regarded.

Sripat Singh Dugar v. *Maharaja Sir P.K. Tagore* (*Lord Buckmaster, L. C.*) *P. C.* 193

——— *Partition—Grandfather—Power to partition between himself and his grandsons—Gift of his share under the partition deed to a stranger by the same instrument—Validity of.*

Under Hindu law, a grandfather can, at his will, effect an equal and fair partition between himself and his grandsons.

A co-parcener cannot make a gift of his undivided share. But once the co-parcenary is converted into a tenancy-in-common, there is no bar to a member of the family disposing of his share by gift ; and it can make no difference in law, that the partition and gift are effected by one and the same instrument.

Aiyavier v. *Subramania Aiyar* (*Abdur Rahim and Oldfield, JJ.*) . 439

———Partition—Validity—Prior agreement by one of members to sell his share—Partition in fraud of purchaser's rights—Effect ... 575

———Religious endowment—Compromise by trustee in respect of claim to office and to trust property—Validity 271

——— *Religious Endowment—Extinction of line of trustees designated by founder—Founder's heirs, right of, to create a new line of trustees. Per Chief Justice and Abdur Rahim, J.* (*Srinivasa Aiyangar, J.* dissenting).

Under the Hindu Law, it is competent to the heirs of the founder of a religious endowment to create a fresh line of trustees on failure of the original line of trustees prescribed by the founder himself.

Authorities on the point, reviewed.

Hindu Law—*Contd.* Page

Boidyo Gauranga Sahu v. *Sudevi Mata.* (*The Chief Justice, Abdur Rahim and Srinivasa Aiyangar, JJ.*) *F. B.* 597

———Religious Endowment—Mutt—Head of—Position and powers —Permanent lease by—Validity—Binding nature on successors. ... 24

———Religious endowment—Mutt—Head of—Power of appointing junior—Fraudulent exercise of —Validity of appointment ... 271

——— Religious Endowment—Mutt—Mortgage of property—Necessity —Proof—Quantum—Recognition of mortgagor by successive heads—Effect 869

———Religious endowment— Pandarasannadhi.— Suit to remove a person from office of—Limitation—Limitation Act—art 120. ... 271

———*Widow—Authority to adopt—Construction—Principles—Authority to adopt boys named—Adoption of another without attempting to follow instructions of deceased—Husband's natural younger brother—Adoption of—Validity—Hindu Law—Custom—Question as to invalidity of adoption under Hindu Law not to be allowed to be raised at late stage —Instructions of the husband to be strictly followed.*

Where a Hindu executed a will giving permission to his widow to receive in adoption for him either G or L, minor sons of his junior paternal uncle S, and the widow adopted another boy altogether not only without making any attempt to follow the instructions of the husband but after making every effort to avoid conforming to those instructions, *held*, that the adoption was on that ground bad.

Quære.—Whether assuming that the widow was unable to adopt the boys mentioned in the will because their father would not give them in adoption, it was open to her to adopt another son in pursuance of the alleged presumed intention to be deduced from the will.

Quære.—Whether the adoption by a widow of a natural younger brother of her husband is invalid under the Hindu Law and whether it might not be permissible according to the custom of the community to which the parties belong.

A question as to the invalidity of an adoption under the Hindu Law ought not to be allowed to be raised at a stage when the party relying on the adoption can no longer adduce evidence to show that it is valid according to custom.

Lal Rup Narain v. *Gopal Devi* I. L. R. 36 C. 780 (P. C.) referred to.

Sindigi Lingappa alias Sidda Lingappa v. *Sindigi Sidda Basappa.* (*The Chief Justice and Burn, J.*) 47

———Widow—Suit by, under limitation Act of 1877 for recovery of husband's property—Dismissal on question of Limitation—Effect on reversioner's suit after her death—*Res judicata* 627

———Will by father—Bequest of ancestral property to female members of family—Validity—Consent of adult sons and other relations—Effect 864

Insolvency—Appeal—Decision in—Validity—Appeal filed by one Official Receiver—His resignation during its pendency—Appeal heard and disposed of without bringing his representative on record—Effect—Distinction between Presidency Towns Insolvency Act and Provincial Insolvency Act 520

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Landlord and Tenant—*Waste or jungle land in Zemindari—Kudivaram rights—Ryots· if entitled to—Limitation Act (of 1877) S. 22—Scope of—Assignee* pendente lite—*Civil Procedure Code (of 1882) S. 372*

With regard to waste or jungle lands in a Zemindari the presumption is that the Zemindar owns the kudivaram rights also and the onus of proving the contrary is on the ryots.

S. 22 of the Limitation Act of 1877, applies only where a plaintiff is added or substituted with a view to litigate a right for himself independently of the rights of the original plaintiff and not to cases where a suit properly instituted is allowed to be continued by an assignee *pendente lite* of the rights of the original plaintiffs, under S. 372 of the Code of Civil Procedure, 1882.

Abdul Rahman v. *Amir Ali* (1907) I. L. R. 34 C. 612 Dissented from *Rai Charan* v. *Biswa Nath* (1914) 20 C. L. J. 107, 109. *Chunni Lal* v. *Abdul Ali Khan* (1901) I. L. R. 28. A. 331 Referred to.

Arunachella Ambalam v. *R. G. Orr* (*The Chief Justice and Seshagiri Aiyar, J*) 407

Legal Practitioner—Duty in *ex parte* cases 206

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Limitation—Adverse Possession—Chairty not barred so long as manager not barred. 85

———Adverse Possession—Mortgagor and Mortgagee—Possession of mortgagee under instrument providing for his becoming absolute owner after a fixed date—Possession after date fixed if adverse to mortgagor. 317

———Adverse Possession—Successive trepasses— Prescriptive right acquired by which trespasser, ... 85

———Adverse Possession—Title by—Property not capable of enjoyment during period of adverse possession—Effect. 505

———*Suits for rent based on a registered contract—Whether Art.* 110 *or Art* 116 *of the second Schedule to the Limitation Act applies—Mining royalties—Are they "rent" under the Limitation Act—Indian Limitation Act, (Act IX of* 1908) *Schedule* 2, *Arts.* 110, 116—*Error in decree—May be corrected by Appellate Court as against a party appealing in favour of a party who has not appealed.*

Suits for rent based on a registered contract are governed by Art. 116 and not by Art. 110 of the Indian Limitation Act, 1908, Schedule 2.

Lalchand v. *Narayan* (1913) I L R 37·B 656, affirmed.

Ram Narain v. *Kamta Singh* (1903) I L R 26 A 138, disapproved,

The trial Court made a decree against the first defendant partly in favour of the plaintiffs and partly in favour of the second defendant. First

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defendant alone appealed. The Appellate Court corrected the second part of the decree by awarding to the plaintiffs for the second defendant's benefit the amount awarded to him directly by the first Court.

First defendant in this appeal contended that the High Court had no jurisdiction to do this.

Held, that as the first defendant had brought the decree before the High Court for review, they had power to make the decree they did.

Tricomdas Cooverji v. *Gopinath Jiu* (*Lord Sumner*) *P. C.* ... 357

———**Act of 1877**—Hindu Law—Widow—Decree against on ground of limitation—Reversioner's suit after her death—Maintainability—Difference between Limitation Acts of 1859, 1871 and 1877. 627

———**S. 10, Arts. 134, 142 and 144**—*Scope of—Public Trust—Charity—Sale of trust property in execution of decree against trustee—Auction purchaser in possession for over 12 years—Suit for possession by succeeding trustee—Limitation—Trustee empowered to take a personal allowance out of the income of the charity properties—Effect of—Receiver—Possession of on behalf of successful party—Trespasser in possession of property as trustee—Ouster by fresh trespasser—Ejectment—Right of prior trespasser—Charity—Representation by trustee—Charity barred only when trustee barred.*

One S. dedicated certain properties to a charity by two deeds of the years 1890 and 1894 respectively, under which S and his heirs in order of seniority were constituted trustees of the charity and the trustee for the time being was empowered if he was so inclined to take Rs. 144 a year for his own use out of the income of the charity properties. S. died in 1895 and after his death a decree was obtained against his only son A, who was also the trustee of the charity, for a large sum said to be due from S. In execution of that decree the charity properties were attached and sold as the property of S, the first defendant being the purchaser. The first defendant obtained delivery of the properties in 1898 and continued in possession ever since. A, the son of S, was removed from the trusteeship in July 1913 and soon after, A's son the plaintiff, sued as trustee of the charity to recover possession of the charity properties on the ground that their sale for the payment of the personal debts of S. was void and that the first defendant had acquired no title by his purchase. It was alleged by the plaintiff that the first defendant purchased the properties in Court auction with the knowledge that they had been validly dedicated to charity, and that even when A. was the lawful trustee, the plaintiff, then a minor, was in possession of the charity properties until he was dispossessed by the defendant in the year 1898. It was found that in a prior suit brought by the plaintiff against the first defendant for recovery of the charity properties, the plaintiff had set up his possessory title but the Court had dismissed the suit on the ground that the plaintiff had no right to sue in ejectment.

Held, that the suit brought by the plaintiff as the lawful trustee of the charity in succession to A. was barred by limitation either under Art. 142 or under Art. 144 of the Limitation Act; and that the plaintiff's claim based on possessory title must fail, the same having been set up and rejected, rightly or wrongly, in the prior litigation between the same parties.

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Held further, that the sum of Rs. 144 which the trustee for the time being was entitled to take out of the income of the properties, was not an interest in the charity properties which could pass to an alienee and by virtue of which the alienee could claim to hold possession of the charity properties during the period when the alienor remained a trustee. Consequently it was not open to the plaintiff to bring his action within 12 years after he became a trustee or to plead that the possession of the first defendant was not adverse to him or to the charity till the beneficial interest of A of which the first defendant was the transferee, ceased.

Abhiram Goswami's case (1909) I L R 36 C 1003, *Narasaya Upada* v. *Venkataramana Bhatta* (1912) 23 M L J 260, *Muthuswamier* v. *Sree Sreemethanithi Swamier* (1913) I L R 38 M 356=25 M L J 393 Referred to.

The exemption contained in S. 10 of the Limitation Act in favour of assigns for valuable consideration should not be restricted to *bona-fide* purchasers of the trust property without notice of the trust. In order to claim the benefit of Art 134 of the Limitation Act, it is not necessary that the transferee should have been entirely ignorant of the restricted nature of the transferor's title, but it is enough if the transferee takes that which is *de facto* a trustee's or mortgagee's limited interest upon the representation and in the full belief that it is an absolute title.

Radhanath Doss v. *Gisborne* (1871) 14 M I A 1; *Singaram Chettiar* v. *Kalianasundaram Pillai* (1914) M W N 735 Referred to.

Ram Kanai Ghosh v. *Rajah Sri Hari Narayan Singh* (1905) 2 C L J 546 followed.

The possession of the Court through a Receiver can only be on behalf of the party finally held by the Court to be entitled to the properties in dispute.

A person in possession without a title has the right to maintain his possession against all the world except the rightful owner. He can sue in ejectment and recover possession from any person who subsequently dispossesses him unless the latter is the real owner or claims under him. To such a suit, proof by the defendant that the real title is outstanding in a third party is no defence. In fact the prior possession is itself a root of title and the prior possessor has all the rights of a true owner except of course against the owner himself.

Asher v. *Whitlock* (1865) L R 1 Q B 1; *Perry* v. *Clissord* (1907) A C 73; *Sunder* v. *Parbati* (1889) I L R 12 A 51; *Narayana Rao* v. *Dharmachar* (1902) I L R 26 M 514 Referred to.

A charity is barred and can be barred only when its trustee or manager is barred, as the charity can only sue through a natural person.

JagadindraNath Roy v. *Hemanta Kumari Debi* (1904) I L R 32 C 129 Referred to.

Subbaiya Pandaram v. *Mahamad Musthapa Maracayar.* (*Ayling and Srinivasa Aiyangar, JJ.*) 85

———S. 20—Payment under—What constitutes 317

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———**Art. 85**—*Mutual, open and current accounts—Striking of a balance due on a particular date, not signed—No running account on the date of suit—Whether suit falls under Art.* 85,

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In the case of a mutual, open and current account the mere fact that there was a settlement in the sense of striking of the balance due on a particular date, does not disentitle the plaintiff from claiming the benefit of Art. 85 when the settlement is not signed by the defendant and does not amount to an account stated within the meaning of Art. 64.

Murugappa Chetty v. *Vyapuri Chetti*. (*Abdur Rahim, Offg. C. J., and Seshagiri Aiyar, J.*) 536

——————**Arts. 110, 116**—Mining royalties due under a registered contract —Suit for—Limitation 357

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——————**Art. 123**—Buddhist Law—Succession—Right of eldest (aurasa) son to a fourth share on his father's death—Suit to enforce—Limitation 71

——————**Art. 134**—Transfer for valuable consideration—Permanent lease for annual rent by head of mutt—Knowledge of transferee of limited nature of transferor's title—Effect on applicability of article ... 24

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——————**Arts. 181 and 182**—*Mortgage—Preliminary decree for sale before the C. P. Code of* 1908—*Expiry of time fixed for payment of money, after the new code came into force—Application for final decree—Limitation—Starting point—Appeal by mortgagee-decree-holder from preliminary decree—Effect of.*

In a suit for sale on foot of a mortgage a preliminary decree was passed on 28-9-1908 giving the mortgagor time till 28-3-1909 to pay up the decree amount The mortgagee-decree-holder preferred an appeal and a second appeal from the preliminary decree and the decree on second appeal was passed on 29-7-1910 confirming the decrees of the courts below. On 18-7-1913 the decree-holder presented an application for execution which was dismissed for non-production of the decree of the first court. On 19-8-1914 the decree-holder applied for a final decree and the application was opposed by the judgment-debtor on the ground that it was time-barred.

Held, that Art. 181 of the Limitation Act and not Art. 182 applied to the case and that, as time began to run from the date of the decree in second appeal, the application was not barred.

Husain v. *Karim* (1915) I L R 39 M 544 dist. *Lakshmi Achi* v. *Subbarama Iyer* (1915) I L R 39 M 448=29 M L J 491 ; *Beni Singh* v. *Berhamdeo Singh*, (1915) 19 C W N 473 ; *Madho Ram* v. *Nihal Singh*, (1915) I L R 38 A 21 ; *Ramaswami Kone* v. *Sundara Kone*, (1907) I L R 31 M 28=17 M L J 495 ; *Manavikrama* v. *Muniappan*, (1891) I L R 15 M 170=2 M L J 23 referred to.

Nimmala Mahankali v. *Kallakuri Seetharamiah*. (*Ayling and Seshagiri Aiyar, JJ.*) 455

——————**Art. 182 (5)**—*Application in accordance with law—Prior application for execution—Omission to file encumbrance certificate or to specify assessment on the land—Returned for correction but not re-presented—Whether saves time for a subsequent application—Observations on the state of the law in this respect.*

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An application for execution presented within three years of a former application which was returned by reason of the omission to file an encumbrance certificate with that application and by reason of the omission to specify the assessment fixed on the land sought to be sold, but which was not re-presented afterwards is not barred by limitation under Art. 182 (5) of the Limitation Act. The former application is one in accordance with law in spite of those defects.

Observations on the uncertainty of the law as to an application being "in accordance with law" within the meaning of the Limitation Act and the desirability of legislative interference in regard thereto.

Natesa Pillai v. *Ganapathia Pillai* (*Ayling and Seshagiri Aiyar, JJ.*)... 621

Lis pendens—*Attachment—Claim petition allowed—Suit against claimant —Judgment-debtor not party to claim proceedings or suit—Auction purchaser in execution of another decree-against judgment-debtor pending suit—Whether gets a good title against the first attaching decree holder or subsequent purchaser in execution of his decree.*

If when a decree-holder has attached the property of the judgment-debtor in execution of a money decree and while he is seeking to establish his right to attach and sell such property as the property of the judgment-debtor by suit against a successful claimant, the judgment-debtor not being a party to the claim proceedings or the subsequent suit, another decree holder attaches the same property and brings it to sale, such auction purchaser is not affected by the rule of *lis pendens* and a subsequent purchaser at a court auction in execution of the decree in execution of which claim proceedings were taken, does not acquire a good title as against the prior auction-purchaser.

Per Chief Justice.—Where the right to attach the property as the property of the judgment-debtor is admitted, a prior attachment by one creditor does not affect a sale under a later attachment by another; and the fact that the prior attachment is being questioned by a stranger to the suit makes no difference.

The doctrine of *lis pendens* applies only to alienations which are inconsistent with the right which may be established by the decree in the suit. As the former sale in execution proceeded on the very footing that the property belonged to the judgment-debtor, the doctrine of *lis pendens* is inapplicable to the case.

Munisami v. *Dakshinamurthi Pillai* (1882) I. L. R. 5 M. 371. followed.

Per Napier, J:—It would make no difference in the case, even if the judgment-debtor was a party to the claim proceedings, provided that he was not a party to the claim suit.

Observations in *Krishnappa Chetty* v. *Kadir Moidin Sahib* (1913) I. L. R. 38 M. 535, disapproved.

Pethu Aiyar v. *Sankaranarayana Pillai.* (*The Chief Justice and Napier, J.*) 374

Madras City Municipal Act (III of 1904),—S. 150.—"*Kept*"—*Meaning —Car under repair and unfit for immediate use—Tax on—Legality.*

Madras City Municipal Act—*Contd* Page

The three phrases " kept ", " let out for hire " and "used" in S. 150 are employed distinctively and the word "kept" is not qualified by the words "for hire."

A car does not cease to be "kept" within the meaning of S. 150 because it is under repair and for that reason unfit for immediate use. Under that section a tax is therefore leviable on such a car.

Krishna Rao, In re (*Ayling and Napier, JJ*). 99

Madras Civil Courts Act (III of 1873) Ss. 12 and 13—*Decree beyond pecuniary jurisdiction, if and when can be passed—Decree for more than Rs. 5,000, by District Munsif, in a suit for accounts—Appeal from decree lies only to District Court.*

Per *Ayling* and *Srinivasa Aiyangar*, *JJ*.

In suits for accounts or mesne profits, the Court can award such sum as it finds due to the plaintiff though such sum is above the pecuniary limits of its jurisdiction.

Arogya Udayan v. *Appachi Rowthan* (1902) I L R 25 M 548; *Ratnasawmy Chetty* v. *Ratnammal* (1914) 27 M L J 388; *Madho Das* v. *Ramji Patak* (1894) ILR 16 A 286; *Sudarshan Das Shastri* v. *Ram Prasad* (1910) I L R 33 A 97 referred to.

Golap Singh v. *Indra Coomar Hazra* (1909) 12 C W N 498 not followed.

Held by the Full Bench, that where a suit for accounts is instituted in a District Munsif's Court, the plaintiff valuing the subject-matter of the suit at an amount within the pecuniary jurisdiction of the District Munsif and a decree is passed for more than Rs. 5,000, the appeal from that decree lies to the District Court and not to the High Court.

Ayyalu Naidu v. *Ramasami Naidu*, (1916) C. M. A. 181 of 15; *Chathanath* v. *Kunhunni Menon* (1893) 4 M L J 48 overruled.

Ijjatula Bhugan v. *Chandra Mohan Banerjee* (1907) I L R 34 C 954 dissented from.

Putta Kannayya Chetti v. *Rudrabhatla Venkata Narasayya*. (*Abdur Rahim, Spencer and Srinivasa Aiyangar, JJ.*) *F.B.* 221

Madras Estates Land Act (I of 1908) S. 3 (2)—"*Tanjore Palace-Estate*", *if an "Estate"—Granted in Inam—Irresumable grants, if within the Act.*

The Tanjore Palace Estate, having been confiscated and granted afresh in 1862 by the British Government as an act of grace and favour, to the widows of the late Rajah of Tanjore and his other heirs, must be deemed to have been " granted in inam ". Consequently where the *kudivaram* of a village forming part of the Tanjore Palace Estate has all along been with the tenants on the land, the village comes within the definition of estate in S. 3 (2) (*d*) of the Madras Estates Land Act.

It was not the intention or the policy of the Legislature to exclude from the operation of S. 3 (2) (*d*) of the Estates Land Act, grants which are irresumable.

Sundaram Iyer v. *Deva Sankara Bhutt* (1915) S A 2661 of 1913, overruled.

Sundaram Ayyar v. *Ramachandra Ayyar*. (*The Chief Justice, Sadasiva Aiyar, and Seshagiri Aiyar, JJ.*) *F.B.* 883

Madras Irrigation Cess Act. Page.

Madras Irrigation Cess Act, (Madras Act VII of 1865) S. 1 (b) — *Certificate as to the beneficial nature and sufficiency of the irrigation to the crops— Necessity of—Duty of the Revenue officer to satisfy himself only of an executive and not a judicial nature — "Irrigation by percolation," whether covers cases where subsoil water is taken to the roots of trees—The proper authorities to decide whether a land is irrigated from a Government source and whether it is chargeable.*

It is not obligatory on the Collector to certify himself under S. 1 (b), Act VII of 1865, that the irrigation is beneficial. The duty imposed on the Collector to satisfy himself that the irrigation in any particular case is beneficial to the land is not of a judicial character liable to be reviewed by a Civil Court.

Secretary of State for India v. *Swami Naratheeswarar* (1911) I L R 34 M 21; *Raja Ramachandra Appa Rao* v. *Secretary of State for India* (1912) I L R 35 M 197, referred to.

"Irrigation by percolation" within S. 1 (b) of Madras Act VII of 1865, is not confined to irrigation by means of water flowing on the surface of the land irrigated, but covers also cases where subsoil water is taken up by the roots of trees.

Per *Abdur Rahim*, Offg. C.J. (*Phillips, J.* dissenting). Whether a particular land is irrigated by water derived from a Government source is a question of fact to be tried by the Court and is not left to the opinion of the Revenue authorities.

The Secretary of State v. *Mahadeva Sastrial.* (*Abdur Rahim, Offg. C. J., Seshagiri Aiyar and Phillips, JJ.*) 411

Malabar Compensation for Tenant's Improvements Act (I of 1900)— *Object and scope of—Trees of spontaneous growth — Rights of Jenmi and Kanomdar — Provision empowering jenmi to enter in the land, cut and remove trees if valid.*

The Malabar Compensation for Tenants Improvements Act does not effect a transfer of ownership in trees of spontaneous growth from the jenmi to the tenant. The Act merely regulates the right of the tenant to compensation. Under the Act, the tenant on eviction by the landlord, is entitled to compensation in respect of all spontaneously grown trees left on the holding which came into existence either during the term of his own lease or that of his predecessor, provided no compensation has already been paid for it.

A contract entered into after 1886 under which the landlord is empowered to enter on the demised land, cut and remove trees of spontaneous growth is void as being in contravention of S. 19 of the Act.

Quaere: Whether the ownership in trees of spontaneous growth before Madras Act I of 1900 vested in the jenmi or the tenant.

Narayani Amma v. *Kunchukutti Amma.* (*Coutts Trotter and Seshagiri Aiyar, JJ.*) 541

———**Ss. 5, 6 and 19**—*Landlord and tenant—Compensation for improvements—Rate fixed by contract entered into before 1st January 1886—Effect of the Act.*

A contract entered into between a Malabar tenant and his landlord before 1st January 1886, according to which compensation is payable at certain rates therein specified, is valid and binding on them, whether the

Malabar Law. Page.

rates are more or less favourable to either party than the rates prescribed by the Malabar compensation for Tenant's Improvements Act.

When the question of the rate of compensation comes up for determination at a date after the introduction of the Act, it is not open to either party to a contract entered into before 1st January 1886 to elect to have the rates fixed according to the Act in preference to the rates mentioned in the contract.

Obiter dictum in *Kozhikot Sreeman A. Vikraman* v. *Madathil Ananat Pattar* (1910) I L R 34 M. 61=20 M L J 849 ; *Paru Amma* v. *Kunhikandan* (1911) I L R 36 M 410=22 M L J 221 ; *Kochu Rabia* v. *Abdurahiman* (1913) I L R 38 M 589=26 M L J 523 overruled 523

Kunhalloor Puthia Veetil Rayarappa Atioti v. *Vathukoilath Parkum Punnisseri Kelappa Kurup.* (*The Chief Justice, Abdur Rahim, Oldfield, Srinivasa Aiyangar and Phillips, JJ.*) *F. B.* 110

——— **S. 19**—*Lease—Provision for payment of Kuttikanom to landlord, on trees cut by tenant—Enforceability.*

A stipulation in a Malabar lease for payment to the landlord of *Kuttikanam* (stump fee) at the customary rate of eight annas for every tree cut down by the tenant, is not contrary to the provisions of S. 19 of the Malabar Compensation for Tenants Improvements Act.

Vasudevan Nambudripad v. *Valia Chattu Achan* (1900) I L R 24 M 47 Referred to.

Rajah of Cochin v. *Kittunni Nair.* (*The Chief Justice, Abdur Rahim, Oldfield, Srinivasa Aiyangar and Phillips, JJ.*) *F. B.* ... 295

Malabar Law—*De jure Karnavan—Restriction of powers by family Karar—Breach of provisions of Karar—Suit for removal of Karnavan—Maintainability—Conditions—Karnavan undertaking to manage well in future—Effect—Conditional decree against de jure Karnavan—Validity on dissentient members—Family Karar—Validity—Consent of de jure Karnavan—Necessity—Death of consenting de jure Karnavan—Effect—Suit to remove Karar manager who is not de jure Karnavan—Junior member's right to maintain—Reservation in Karar of member's right to sue to enforce Karar—Effect.*

The removal of a *de jure* Karnavan on the ground that he acted against the provisions of a family Karar restricting his powers can be justified only if the violation by him of the karar terms was of so gross a character that it constituted serious misconduct on his part. The Court must be satisfied that the interests of the tarwad have been and would (in the future) be seriously jeopardised by his past acts and his probable future conduct and that his removal is required in the interests of the tarwad.

Where all that was proved against the Karnavan in effect was that he had not been a very careful manager and he gave an undertaking to look after the tavazhi affairs in future more diligently the Court declined to remove him.

Courts have no power without the consent of the *de jure* Karnavan to impose conditions on him and to pass a conditional decree that " if the Karnavan sets right the mischief committed by him by following certain directions, the suit for his removal would be dismissed, but that otherwise he would be removed."

Malabar Law—*Contd.* Page

No suit lies to remove a Karar manager who is not the de jure Karnavan.

A family Karar entered into by a majority of the members of a tarwad with the consent of the de jure Karnavan is not binding on a dissentient member in so far as it seeks to restrict his right to succeed to the full powers of a karnavan in the natural course of events or if it interferes with his right to reasonable provision for maintenance; in all other respects it is binding.

The Karar falls to the ground on the death of the *de jure* Karnavan who consented to be bound by it (or his removal by decree of Court) and the next *de jure* Karnavan is not bound by the restrictions imposed by the Karar on his predecessor except perhaps where he himself has agreed in that Karar to be bound by those restrictions whenever he succeeded to the stanom.

The adult members of the tarwad have it in their power with the consent of the *de jure* Karnavan to vary the terms of the Karar by a majority vote taken in a family Council.

Per Sadasiva Aiyar, J.—Every junior member of a tarwad cannot bring a suit for settling schemes for the management of his tarwad properties and for the removal by Court from the office of manager a person whose rights to so manage are founded solely on a family Karar.

Per Napier, J.--In the absence of a special provision in a family Karar reserving to any of its signatories the right to bring a suit to enforce the Karar, a junior member cannot maintain it. The proper person to enforce the Karar against the Karar manager is the *dejure* Karnavan.

Semble, Contra if the Karar reserves such a right.

Per Sadasiva Aiyar, J.--Unless the Karnavan himself is disabled from suing to recover possession of or obtain other relief regarding the tarwad property, an anandravan cannot be allowed to sue on behalf of the tarwad for the relief claimable by the tarwad in respect of the tarwad property, nor can he be allowed to sue for a mandatory injunction requiring the Karnavan to act in a particular way.

Cheria Pangi Achan v. Unnalachan. (*Sadasiva Aiyar and Napier, JJ*) 323

——*Karnavan—Right to recover lands in possession of junior members under an agreement by a former Karnavan in lieu of maintenance.*

Where the junior members of a tarwad are in possession of some lands under an arrangement entered into by the former Karnavan by which they were to enjoy the same in lieu of maintenance, the succeeding Karnavan cannot set aside the arrangement except for good cause.

A suit for possession of land granted in lieu of maintenance cannot be maintained unless the succeeding Karnavan seeks to set aside the arrangement and offers to make some other suitable arrangement for the maintenance of the junior members.

Ramaswami Pattar v. *Gopalan styled Kallampalli Valia Nayar.* (*Abdur Rahim Offg. C. J and Spencer, J.*) 97

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———*Tarwad joint property—Sale by some of the members of the tarwad —Binding nature on other members and on tarwad as a whole— Conditions—Karnavan's joining in sale—Necessity—Co-owners — Mortgage—Redemption suit by one —Decree for partition and redemption of plaintiff's share when will be passed—Second Appeal—Amendment of Plaint in—Practice.*

A sale of the joint property of the members of a Malabar tarwad by some only of the members of the tarwad cannot bind the other members of the tarwad as a whole unless it is made for consideration and is beneficial to the family as a whole and unless the Karnavan as representing the tarwad joins in it.

Arayalprath Kunhi Pooker v *Kanthilath Ahmad Kutti Haji* (1905) I L R 29 M 62. followed.

The fact that the Karnavan was absent from the place at the time of the sale and that the sale was effected by the senior lady and the real manager will not make it binding on the tarwad.

In a suit by one co-owner for redemption of the whole mortgage the Court can, if there is no great difficulty in ascertaining the particular share to which plaintiff is entitled, pass a decree for both the reliefs for partition and redemption. The principle of the decisions in *Mamu* v. *Kuttu* (1881) I L R 6 M 61 and *Thillai Chetti* v. *Ramanatha Aiyan* (1896) I L R 20 M 295, must be restricted to cases where plaintiff's share cannot be so ascertained.

In second appeal, their Lordships allowed plaintiff to amend his plaint, which prayed for redemption of the whole mortgage, by praying for recovery in the alternative of the share and for partition and redemption of such share on payment of proportionate amount of the mortgage-money.

Puthisseri Maniyannoor v. *Thozukkat Pullaniyil* (*Oldfield and Phillips. JJ.*) 489

Mahomedan Law—*Co-heirs—One of them in possession of the estate—Sale for discharging debts of deceased owner, if binding on other co-heirs or creditors of deceased.*

When one of the co-heirs of a deceased Mahomedan, in possession of the whole estate of the deceased or of any part of it, sells property in his possession forming part of the estate for discharging the debts of the deceased, such sale is not binding on the other co-heirs or creditors of the deceased.

The *obiter dictum* in *Pathummabi* v. *Vittil Ummachabi* (1902) I L R 26 M. 734; and *Hasan Ali* v. *Mehdi Husain*, (1877) I L R 1 A. 533. disapproved.

Abdul Majeeth Khan Sahib v. *Krishnamachariar.* (*Abdur Rahim, Spencer and Srinivasa Ayyangar, JJ.*) *F. B.* 195

———*Deed of Settlement—Wakf—Gift in perpetuity by a Mahomedan to his family, following a gift to charitable purposes—Under what circumstances such gift is valid—Tests to be applied to settlements prior to the Mussalman Wakf Validating Act,* (*VI of* 1913).

Mahomedan Law—*Contd.* Page

The Mussalman Wakf Validating Act, S. 3 expressly enacts that it shall be lawful for any person professing the Mussalman faith to create a wakf, which in all other respects is in accordance with Mahomedan Law "for the maintenance and support, wholly, or partially of his family, children or descendants."

But this Act though in terms declaratory, is not retrospective, and in the case of settlements prior to the Act such a gift is not *per se* a good and valid wakf. The test to be applied in such cases is that laid down in *Mujibunnissa* v. *Abdul Rahim.* (1900) L R 28 I A 15=I L R 23 A-233.

The gift will be valid if the effect of the deed is to give the property in substance to charitable uses. It will not be so if the effect is to give the property in substance to the testator's family.

To determine whether any particular case answers the test, all the circumstances existing at the date of the deed must be taken into consideration, such as the financial position of the grantor, the amount of the property, the nature and the needs of the charity, their probable or possible expansion, the priority of their claim upon the settled fund, and such like.

Ramanadan Chettiar v. *Vava Levvai Marakayar* (*Lord Atkinson*) *P. C.* 101

——— *Pre-emption—Date from which title passes to pre-emptor—Mesne profits belong to original purchaser till purchase money is paid in full by pre-emptor—Code of Civil Procedure, (Act XIV of 1882) S. 214.*

A person claiming an order of pre-emption cannot be regarded in the same light as an ordinary purchaser of an estate. His right is, when an estate has been sold, to acquire the property from the purchaser at the price paid. If the necessary formalities are observed, and the purchaser assents to the claim, possession is given by mutual consent, but if the claim be disputed and suit must be brought, the rights of the parties are regulated by the Code of Civil Procedure, which in this respect embodies the principle of the Mahomedan Law.

It therefore follows that where a suit is brought it is on payment of the purchase money on the specified date that the plaintiff obtains possession of the property, and until that time, the original purchaser retains possession and is entitled to the rents and profits. It is only when the terms of the decree are fulfilled and enforced that the persons having the right of pre-emption become owners of the property. Such ownership does not vest from the date of sale: the actual substitution of the owner of the pre-empted property dates with possession under the decree.

In this case, the first court gave a decree for pre-emption to the plaintiffs on their paying Rs. 37,000 the consideration found by the court to have actually passed for the sale in favour of the defendant. On appeal, the High Court dismissed the suit on the ground that the necessary formalities had not been gone through. The Privy Council reversed the judgment of the High Court disagreeing from the High Court as to the formalities, but as they found that the consideration for the sale was Rs. 14,850 directed that amount to be paid as the price of pre-emption. The amount was paid and possession was taken by the plaintiffs in pursuance of the Privy Council decision. Pending the appeal to the High Court, plaintiffs had

Mahomedan Law—*Contd.* Page

taken out execution and got possession which was restored to the defendant on the passing of the High Court judgment. Plaintiffs contended that they were entitled to mesne profits from the date of their original taking possession. *Held* that they were not, as their ownership of the property dated only from their taking possession under the Privy Council decree.

Deonandan Prashad Singh v. *Ramdhari Chowdhri.*(*Lord Buckmaster*, L. C.) *P. C.* 459

Marumakkathayam Law—*Mopla Tarwad—Question of partition—Separate Tarwad or tawashi—whether a document can be treated as creating rights when not in terms sued on—Code of Civil Procedure*, 1908 (*Act V of* 1908) *S.* 59.

A plaintiff cannot be allowed to put forward as creating rights a document on which he has not in terms sued.

Sulaiman v. *Biyathumma.* (*Sir Lawrence Jenkins*) *P. C.* ... 137

Mesne Profits—Suit for—Jurisdiction—Suit in Munsif's Court—Decree for more than Rs. 5,000—Appeal—Forum 222

Mineral rights—*Presumption in favour of Zemindar's ownership—Talabi Brahmottar grant made prior to* 1790—*Grant without specification of minerals, effect of.*

When a grant is made by a Zemindar of a tenure at a fixed rent, although the tenure be permanent, heritable, and transferable, minerals will not be held to have formed part of the grant in the absence of express evidence to that effect.

Held, accordingly, that a Talabi Brahmothar grant of a mauzah of a date prior to 1790 did not carry with it mineral rights.

Jyoti Prasad Singh v. *Lachmipur Coal Company* (1911) I. L. R. 38 C 845 affirmed. *Hari Narayan Singh* v. *Sriram Chakravarti* (1910) L. R 37 I. A. 136=I L. R. 37 C. 723; *Durga Prasad Singh* v. *Braja Nath Bose* (1911) L. R. 39 I. A. 133=I. L. R. 39 C. 696. followed.

Sashi Bhushan Misra v. *Raja Jyoti Prasad Singh.* (*Lord Buckmaster* L. C.) P. C. 245

Mining royalties due under registered Contract—Suit for—Limitation. 357

Mirasi Village—*Gramanattam—Rights in, of Government and of mirasidars—Grant of nuttam on patta by Government—Mirasidar's suit for recovery of nuttam—Proof—Onus—Quantum—Rights over waste generally—Recognition of mirasi right by the State—Proof—Quantum—"Double entry system"—What is.*

Per *The Chief Justice*: The question whether unoccupied nuttam in a Mirasi Village is the private property of the mirasidars or not should be decided on the evidence in each case and with special reference to user. There is no general presumption of the mirasidars' ownership of the nuttam in the absence of evidence of user, but where user is shown the presumption of ownership readily arises.

Before the advent of British rule and especially under the Muhammadan rule unoccupied nuttam was not generally recognised by Government as the private property of the mirasidars and their ownership has

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not been established subsequently either by Government recognition or by judicial decisions.

Per *Ayling*, J.:—The mere fact that certain persons are the mirasidars of a village neither carries with it the right to recover possession of a house site in the village held under a patta from Government, nor does it even raise a presumption of the existence of such a right. The rule is inapplicabe to cases in which a mirasidar has, prior to the grant by Government, already acquired a title to the particular site either by previous grant or prescription. It does not also preclude the mirasidars of a particular village from showing that in that village they have acquired by prescription a title in the nustam generally as against Government which would include the right in question.

Enumeration of incidents of mirasi tenure.

Although all the incidents may have a common origin in the status of the mirasidar, none of them necessarily involves another. Each requires to be separately established: and recognition by the state, whether express, or implied, is an indispensable condition for the enforcement of each.

The burden of proof of recognition of mirasi right by the state rests on the mirasidars.

Where it is clear that the right claimed tends to the prejudice of a purpose to which the property is admittedly dedicated, it is the duty of a court to require very strict proof before giving a decree in its favour.

Quaere whether at the present day Government would pay compensation to the mirasidars of a village for cultivable waste therein acquired by it.

Per *Kumaraswamy Sastry*, J.—1. In mirasi villages the rights of Government over waste (including nustam and cheri) are subject to the rights of the Mirasidars;

2. The nature and extent of such rights are not uniform throughout the Presidency but vary, and the onus is on the Mirasidars to prove that any specified incident attaches to Mirasi rights in any particular district, there being no presumption that Gramanuttam is the exclusive property of the Mirasidars.

3. The rights of Mirasidars over waste are not extinguished by the mere fact that the Government grants pattas to strangers.

Origin, nature and incidents of mirasi tenure and effect of Act III of 1905 considered.

" Double entry system" explained.

Seshachala Chetty v. *Para Chinnasami* (*The Chief-Justice, Ayling and Kumaraswami Sastri, JJ.*) ... ...Sup. p. 1

Mortgage—Keeping alive 263

———Mutt *property—Necessity—Evidence—Recognition of mortgage by successive heads of* mutt*—Non-production of books of account—Inference therefrom.*

In a suit upon a mortgage granted over the property of a *mutt* by its head, the onus is upon the mortgagee to prove that the mortgage debt was incurred for a necessary expense of the institution itself.

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Where, however, many years have elapsed since the mortgage was executed both lender and borrower being dead, and succeeding heads of the *mutt* have recognised the mortgage debt, the Court should be more easily satisfied than where the mortgage is of more recent date; or its validity has been disputed.

If the mortgagor withhold books of the *mutt* which would show the true nature of the debt, the Court is entitled to draw an inference in favour of the mortgagee.

Murugesam Pillai v. *Manickavasaka Desikar.* (*Lord Shaw*) *P.C.* 869

———*Prior mortgage with possession — Later simple mortgage, both mortgages being executed between* 1858 *and* 1882 — *Clause in later mortgage for mortgagee becoming absolute owner in event of non-payment of principal and interest thereon on date fixed—Validity—Effect —Possession of mortgagee if adverse to mortgagor after date fixed—Transfer of Property Act S.* 60 — *Effect— Suit to redeem earlier mortgage—Right to sue on later mortgage barred on date of—Mortgagee if can claim redemption of later mortgage--Limitation Act, S.*20.

Where in 1874 A executed a mortgage with possession to defendant's ancestress for 36 years and in 1875 executed a simple mortgage to defendants on the same lands for Rs. 400, the latter containing a provision that if the principal amount with interest thereon was not discharged by 13-8-76 the mortgagor had no objection to the mortgagee's holding the property in absolute ownership free from both the mortgages, *held* in a suit for redemption of the earlier mortgage brought after the expiration of the period allowed by Art, 132 of the Limitation Act for a suit to enforce the later mortgage, that

(1) under the equitable principles applicable to mortgages executed subsequent to 1858 and prior to 1882 the clause in the later mortgage in restraint of the right of redemption was a mere clog on the equity of redemption and inoperative ;

(2) defendants' uninterrupted possession for 12 years from 13-8-76 was not adverse to the mortgagor and had not the effect of extinguishing his right to redeem; and

(3) it was not open to the defendants to set up their right as mortgagees under the later mortgage.

Per Ayling, J:—In the case of mortgages executed between 1858 and the date of the passing of the Transfer of Property Act an agreement of parties to the mortgage cannot affect the character of the mortgagee's possession so as to convert it from that of a mortgagee into that of a person prescribing for a full title. *Usman Khan* v *Dasama* (1912) I L. R. 37 M. 515=23 M. L. J. 360, distinguished.

Semble a payment within the meaning of S. 20 of the Limitation Act must be a conscious act.

Athan Kutti v, *Subhadra* (*Ayling and Spencer JJ*)... ... 817

———*Priority—Execution of mortgage bond for moneys due under earlier mortgage, without imposing fresh liability on mortgagor—Endorsement on first bond that it was cancelled—No extinction of security—Rights under first mortgage kept alive against mesne incumbrancers—Suit on mortgage as varied by subsequent bond—Part-*

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payment by mortgagor—Effect of, against mesne incumbrances.

In 1882 A, mortgaged 4 villages to B, for Rs. 25,000 payable on demand with interest at 9 P. C. per annum. In 1888 A, again mortgaged to B the same 4 villages and 2 others to secure the sum of Rs. 39,791 then due on the previous mortgage, agreeing to pay the principal on 30-12-1893 with interest at 6% per annum. At the same time an endorsement was made on the first mortgage that as a separate deed was executed for the principal and interest due on that instrument it was cancelled. Meanwhile, on 24-9-1887 A had mortgaged 3 of the villages comprised in the first mortgage to C who instituted a suit on his mortgage, obtained a decree, and purchased the villages in court-sale. To these proceedings B was not a party. In 1900 and 1903, there were small payments by A towards the principal amount due to B. In 1903, plaintiff an assignee of B's mortgage brought a suit on the mortgage both against A and C.

Held, that the mortgage of 1882 was not extinguished and therefore, C was not entitled to priority over the plaintiff. The effect of the mortgage of 1883 was merely to substitute a covenant to pay the mortgage money in 1893 for the earlier covenant to pay it on demand and to lower the original rate of interest, without in any way affecting the security for the payment of the mortgage money. The endorsement on the first mortgage bond did not operate as a release of the security under it.

Held also, that the plaintiff's suit not being based on the mortgage of 1882, but on that mortgage as varied by the subsequent agreement of 1888 and there being only one covenant to secure the payment of the debt, *viz*, under the later mortgage, the payments towards principal in 1900 and 1903 by the mortgagor had the effect of saving plaintiff's suit from the bar of limitation. A mere change in the form of indebtedness, in the mode or time for payment, a variation of the rate of interest or the giving of additional security is not enough to rebut the presumed intention to retain the mortgage security when it is to the interest of the person who is entitled either to extinguish the security or keep it alive, so to keep it alive.

An agreement between the mortgagor and the first mortgagee extending the time for payment of the mortgage amount in no way impairs the security even as against the subsequent incumbrancers, for the junior encumbrancer is not a surety for the mortgagor. But no agreement between the mortgagor and the first mortgagee can prejudicially affect the rights already acquired by the junior encumbrancer under his mortgage unless he was a party to the agreement or unless his mortgage itself contains a power to the mortgagor to enter into such an agreement.

Velayuda Reddi v. *Narasimha Reddi.* (*Ayling and Srinivasa Aiyangar, JJ.*) 263

———*Subsequent invalid mortgage—Intention to accept new security frustrated—Performance by third party—Indian Contract Act,* 1872 (*Act IX of* 1872), *S.* 41.

A Hindu mortgaged his five-sixths share of a village and died leaving a widow and a separated nephew who was entitled to the reversion if he survived the widow This nephew mortgaged the remaining one-sixth, to which he was entitled of his own right, to the same mortgagee. Thereafter the widow and nephew jointly executed two mortgages of the whole

Mortgage—*Contd.* Page

village for the amounts due under their old mortgages. The mortgagee sued on these later deeds and obtained a decree, which as against the widow was set aside on appeal. Thereafter he sued on the original mortgage of the five-sixths share.

Held, that though the mortgagee's intention at the time of the later deeds was to accept a new security in lieu of the old one, yet as this was frustrated by the fact that the later deeds were held not binding on widow, it was contrary to equity and good conscience that the nephew's heirs, who had succeeded her as reversioners of her husband, should set up the later deeds as a release of the mortgage effected by him ; and that the mortgagee could enforce it against them.

S. 41 of the Indian Contract Act, 1872, which provides for the discharge of a contract by the acceptance of performance by a third party, applies only where the contract has in fact been performed.

Har Chandi Lal v. *Sheoraj Singh.* (*Lord Parker of Waddington*) P.C. 241

———Substitution of a fresh security for—Invalidity of fresh security —Effect on rights under original security 241

———Suit for Sale—Application for final decree—Limitation—Starting point—Preliminary decree before New Code—Expiry after New Code of time fixed by decree for payment—Appeal by mortgagee-decree-holder from preliminary decree—Effect 455

Mortgage with Possession — Personal liability—Existence of—Conditions—Personal liability may arise in certain events though no such liability in the first instance—Right of usufructuary mortgagee to sue for mortgage money—Transfer of Property Act, S. 68 .. 39

Negotiable instrument—Promissory note by trustee—Amount borrowed for purposes of trust—Suit on note—Decree against trust estate if can be given 259

———Pro-note by member of joint family—Indorsement of—Rights of holder against other members 354

North-Western Provinces Tenancy Act, 1901 (U. P. Act II of 1901) Ss. 10, 20 and 83—*Sale of a Mahal—Agreement to surrender ex-proprietary rights void and unenforceable.*

The policy of the North-Western Provinces Tenancy Act, 1901, is to secure and preserve to a proprietor whose proprietary rights in a mahal or in any portion of it are transferred otherwise than by gift or by exchange between co-sharers in the mahal a right of occupancy in his *sir* lands, and in the land which he has cultivated continuously for twelve years at the date of the transfer, and such right of occupancy is by the Act secured and preserved to the proprietor, who becomes by a transfer the ex-proprietor, whether he wishes it to be secured and preserved to him or not and notwithstanding any agreement to the contrary between him and the transferee. That policy of the Act is not to be defeated by any ingenious devices, arrangements, or agreements between a vendor and a vendee for the relinquishment by the vendor of his *sir* land or lands which he has cultivated continuously for twelve years at the date of the transfer, for a reduction of purchase money on the vendors failing or refusing to relinquish such lands or the vendor being liable to

N. W. P. T. Act—*Contd.* Page

a suit for breach of contract on his failing or refusing to relinquish such lands.

All such devices, arrangements and agreements are in contravention of the policy of the Act and are contrary to law and are illegal and void, and cannot be enforced by the vendee in any Civil Court or in any Court of revenue.

Moti Chand v. Khwaja Ikram Ullah Khan (*Sir John Edge*) P.C. ... 383

Onus—Temple — Festival in—Right to perform—Custom excluding particular people—Proof 287

Oudh Rent Act (XXII of 1886)—*Oudh Rent Act* (1886) *Amendment Act No. III of* 1901—*Jurisdiction—Revenue Court—Civil Court—Proprietor—Tenant—Ejectment—Proprietary and Under-proprietary right—Declaration that the holding of lands is merely as tenant—Cause of action.*

In Oudh, in cases to which the Oudh Rent Act (1886) Amendment Act, 1901 (Act 3 of 1901) applies, the Court of Revenue has the exclusive jurisdiction to determine what is the status of a tenant of lands, and what are the special or other terms on which such tenant holds, and the Civil Court has exclusive jurisdiction to decide whether or not a person in possession of lands holds a proprietary or an under-proprietary right in the lands.

In a suit by the plaintiff, whose suit to evict the defendants had been dismissed by Revenue Court on the ground that the latter had under-proprietary rights, for a declaration that he had neither proprietary nor under-proprietary right therein and for possession on proof that the defendant is merely a tenant, the claim for a decree for possession must be dismissed for want of jurisdiction, but the plaintiff is entitled to the declaration prayed for.

Where the Revenue Court had decided that the holders of a village were in 1852 owners of zamindari rights in the village, that they had not lost those rights, that it must be presumed that they were not ordinary tenants, and that the proprietor of the village should prove in the Civil Court that they were ordinary lessees, and the proprietor then brought a suit in the Civil Court for a declaration that they had no proprietary rights of the nature of zamindari, superior or inferior, in the village, and also for a declaration that the decision of the Revenue Court did not affect his rights.

Held, that the decision of the Revenue Court, which was subsequently acted upon in the preparation of the Khewat of the village, made it necessary for the proprietor to bring the suit, and that the fact that the holders of the village did not in their written statement in the suit set up that they had any proprietary or under-proprietary right, did not disentitle the proprietor to the declarations which he claimed.

Abdul Hussan Khan v. Prag. (*Sir John Edge*) *P.C.* ... 388

Patni Tenure—*Chowkidari Chakeran lands—Bengal Permanent Settlement—Bengal Act VI of* 1870 (*The Village Chowkidari Act* 1870) *Ss.* 49, 50, 51—*Bengal Regulation* 8 *of* 1793, *Ss.* 36, 37, 38, 39, 40, 41.

Chowkidari Chakeran lands resumed by Government and transferred to the Zamindar under Bengal Act 6 of 1870 passed by virtue of such transfer to the holder of a Patni lease of the village within which such lands are situate.

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The *prima facie* title of the Zamindar to Chakeran lands within his district is recognised by the Permanent Settlement. The Zamindar's interest in such lands, in the absence of express provision to the contrary, passes under a patni grant.

Not only does Bengal Act VI of 1870 recognise the existing title of the Zamindar to the lands resumed, but the estate taken by the Zamindar under the order of transfer is in confirmation and by way of continuance of his existing estate, and when the Zamindar or those through whom he claims has or have entered into contracts affecting his existing estate the rights of third parties under these contracts are preserved.

Ranjit Singh Bahadur v. *Kali Dasi Debi.* (*Lord Parker of Waddington*) *P.C.* 565

Plaint—Amendment—Failure to make, within specified time-Rejection of plaint—Legality 575

———Amendment in second Appeal—Practice 489

Power of Appointment—Fraud in exercise of power—Appointment in pursuance of—Validity 271

Practice—Appeal—Error in decree of Court below—Correction as against party appealing and in favour of party not appealing ... 357

———*Appeal—Parties—Official receiver appealing to High Court—Resignation of that official receiver and appointment of another—Matter represented to the Court—Order to delete the name of the official receiver that resigned—Judgment and decree wrongly mentioning the old receiver by name—Validity of.*

Where an appeal is preferred to the High Court by an official receiver under the Provincial Insolvency Act, described on the record as "G, the official receiver" and he resigned his post subsequently and another was appointed official receiver and this matter was represented to the High Court and it was directed that the name of the official receiver who filed the appeal should be deleted, but the judgment and the order wrongly gave the name of the official receiver that had resigned, the error in the judgment and the order was a mere clerical error and ought to be corrected; and the judgment and order are not vitiated by the error.

Quaere. Whether a decision is vitiated by reason of not bringing on record the succeeding official receiver under the Provincial Insolvency Act, when the appeal had been filed by his predecessor. Differences in language between the Presidency Towns Insolvency Act and the Provincial Insolvency Act pointed out.

Rama Aiyar v. *Official Receiver of Tinnevelly* (*Sadasiva Aiyar, J.*) 520

———Custom—Question as to, if can be allowed to be raised at late stage 47

———Parties—Causes of action—Misjoinder —Hindu Law—Joint Family—Agreement by member to sell his share—Suit for Specific Performance—Addition of prayer for partition and possession of share —Addition of other members as parties—Propriety ... 575

———Plaint—Amendment in appeal—Suit against a person as agent of another—Conversion into suit against defendant in his own capacity—Permissiblity 146

———In matters of Procedure 487

Presidency Small Cause Courts Act (XV of 1882) Ss. 37, 38—*Powers of the Small Cause Courts under S. 38—Jurisdiction of the Full Bench of the Small Cause Court to decide questions of fact.*

A Full Bench of the Small Cause Court sitting under S. 38 of the Presidency Small Cause Courts Act has no jurisdiction to decide questions of fact generally; nor has it jurisdiction to decide questions of fact, when these questions of fact first arise before it in consequence of its finding on a question of law.

Sai Sikandar Rowther v. *Ghouse Mohidin Marakayar. (The Chief Justice, Abdur Rahim and Srinivasa Aiyangar JJ.) F. B.* ... 213

Press Act (I of 1910) Ss. 3 (1) *proviso, and* 22—*Scope of—Security dispensed with at the time of declaration—Subsequent imposition of security, if valid—Magistrate acting under S 3 (1) of the Press Act, if a judicial body—Writ of certiorari—Powers of High Court—S. 22 of the Press Act, effect of.*

Where at the time of making a declaration under S. 4 of Act 25 of 1867, the Chief Presidency Magistrate acting under sub-section 1, S. 3 of the Press Act, dispensed with the deposit of securiry by the keeper of a printing press and subsequently cancelled his order dispensing with security and directed the keeper of the press to deposit the maximum security.

Held, that the order of the Magistrate imposing security was not a judicial act and therefore not open to revision by the High Court either by means of a writ of certiorari or under its ordinary revisional powers.

Held, per Abdur Rahim Offg. C. J.. and Seshagiri Aiyar, J. (Ayling, J. dissenting) that the order of the Magistrate imposing security was ultra vires, and that S. 22 of the Press Act, by itself, had not the effect of taking away the power of the High Court to issue a writ of certiorari.

Annie Besant, In re. (Abdur Rahim, Offg. C. J., Ayling and Seshagiri Aiyar, JJ) 151

Privy Council—Appeal to—Fresh point in—Practice 559

————Practice—Appeal—*Ex parte* hearing—Non-appearance of respondent due to agent's fraud—Restoration of appeal 39

————Appeal—Practice—Amendment of plaint for first time in appeal. 146

Promissory Note—*Execution by one member of a joint Hindu family—Indorsement—Liability of other members of the family to the indorsee.*

An indorsee of a promissory note executed by a member of a joint Hindu family can sue the maker as well as the other members of the family and obtain a decree against the latter to the extent of the joint family property in their hands, on proof that the debt for which the promissory note was executed, was binding on the family.

T. Seetharama Chetty v. *P. Seshiah Chetty* (1912) M. W. N. 1011 dissented from. *Krishna Iyer* v. *Krishnaswami Iyer* (1900) I L R 23 M 527 followed.

Nataraja Naicken v. *Ayyasawmi Pillai (Ayling and Seshagiri Aiyar, JJ.)* 354

Provincial Insolvency Act—Appeal—Decision in—Validity—Appeal filed by one Official Receiver—His resignation during its pendency—Appeal heard and disposed of without bringing his successor on record—Effect—Distinction in this respect between Presidency Towns Insolvency Act and the Provincial Insolvency Act 520

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——Debtor's petition—Dismissal on the ground that it is an abuse of process of court—Propriety 449

——(**Act III of 1907**), **Ss. 5, 6, 14 15, and 16**—*Debtor's insolvency petition—Order of adjudication—Statutory right of debtor to such order on complying with the terms of the Act.*

The Provincial Insolvency Act, 1907, entitles a debtor to an order of adjudication when its conditions are fulfilled. This does not depend on the Court's discretion, but is a statutory right.

The stage at which to visit with its due consequences any misconduct of a debtor is when his application for discharge comes before the court, and not on the initial proceeding.

Chhatrapat Singh Dugar v. *Kharag Singh Lachmiram (Sir Lawrence Jenkins) P. C.* 1

——**Ss. 16, 18, and 36**—*Insolvent—Father and grandfather of—Sale by all three—Application under S. 36 to set aside sale—Jurisdiction to set aside as regards shares of father and grandfather—S. 46—Order of Single Judge of High Court under—Letters Patent Appeal—Right of.*

Under Ss. 16 and 18 of the Provincial Insolvency Act the shares of the father and grand-father of an insolvent do not vest in the official Receiver, if they had not themselves applied to be declared insolvents. And the court has therefore no jurisdiction under S. 36 of the Act to cancel a sale-deed executed by all three in so far as the shares of the father and grandfather are concerned.

There is a right of appeal against the decision of a Single Judge of the High Court exercising jurisdiction under S 36 of the Act.

Palaniappa Mudali v. *The Official Receiver of Trichinopoly. (Seshagiri Aiyar and Phillips JJ).* 84

——**Ss. 16, 22 and 46**—*Insolvency-Application by debtor to be adjudicated insolvent—Dismissal of, by Official Receiver—Confirmation by District Court on application under S. 22—Appeal to the High Court—Maintainability—Dismissal of debtor's application to be adjudicated insolvent—Grounds for.*

Where the Official Receiver dismissed a debtor's application to be adjudicated insolvent and the District Court on an application under S 22 of the Provincial Insolvency Act confirmed the decision of the Official Receiver.

Held, that an appeal lay to the High Court from the order of the District Court.

An application to the District Court under S. 22 of the Provincial Insolvency Act to revise the decision of the Official Receiver, is not an appeal from a Court subordinate to the District Court within the meaning of S. 46 (1) of the Act.

Where the Court below dismissed an application by a debtor to be adjudicated insolvent on the grounds that he had no realisable assets, that he might be concealing his accounts, cash, and outstandings, that he was not likely eventually to get his discharge and that therefore the petition was an abuse of the process of the Court.

Held that the order was based on a misconception of the objects of the insolvency procedure and should be set aside.

Provincial Insolvency Act—*Contd.* Page

Allagichai v. *Kuppai Pichai Rowther.* (*Oldfield and Seshagiri Aiyar, JJ.*) 449

——**S. 37**— "Creditor"—*Meaning—Surety for insolvent if a creditor for purposes of S. 37.*

A person who stood surety for the payment of a debt by the insolvent is a *creditor* within the meaning of that expression in S. 37 of the Provincial Insolvency Act.

Nalam Viswanatham v. *Official Assingee, Madras* (1915) 32 I.C. 795, Over-ruled.

Roderigues v *Ramasami Chettiar.* (*The Chief Justice; Abdur Rahim and Srinivasa Aiyangar, JJ.*) *F B.* 253

Punjab Customary Law—*Custom of agnatic succession—Exception in favour of daughters residing with husband in the paternal house—Khana-damadi—Riwajiam-its evidentiary value.*

Entries in the Riwaj-i-am are sufficient in themselves even though not supported by instances to prove the existence of a custom.

Beg v. *Allah Ditta.* (*Mr. Ameer Ali*) *P. C.* 615

Receiver— Possession enures for benefit of successful party ... 58

Religious endowments—*Mutts—Mutadhipati, ex-officio trustee of temples—Power of appointing a junior—Appointing a person as junior to secure his own position—Appointment bad—Limitation Act, Article 120—Right to remove a trespasser Matadhipathi; when accrues—Powers of compromise of a trustee of public religious and charitable trusts.*

Where a Mutadhipati succeeded to the headship of the Mutt in 1893 under a will alleged to have been executed by his predecessor and also an alleged abhishekam and his title to headship was subsequently disputed by the 1st defendant in the suit, another Tambiran of the mutt who claimed to be appointed as a junior by that predecessor and alleged that the will and the abhishekam were false and they agreed in 1894 to compromise their differences by the first defendant recognising the position of the other as Mutadhipati and the latter for the purpose of obtaining the advantage of securing his own position appointed the first defendant as junior Pandarasannadhi in exercise of the power of appointment incident to his office, and the Mutadhipati died in 1902 and the 1st defendant succeeded him under the appointment of 1894.

In a suit of the year 1905, under Section 539 of the Civil Procedure Code to remove the first defendant from the headship of the mutt and trusteeship of certain temples, which he held by virtue of his office as Pandarasannadhi and for the appointment of a proper trustee, *held*, the appointment of the first defendant as junior in 1894 was an invalid appointment as it was made by the head of the Mutt in furtherance of his own interests to secure his position.

The suit is not barred by limitation under Article 120 of the Limitation Act as no suit could be brought against the 1st defendant to dispute his right before 1902, when he succeeded to the headship of the mutt.

Per the Chief Justice.—The transaction of the year 1894 by which the 1st defendant was appointed as junior was of a highly objectionable character and the Court cannot countenance it even after a great length of

time, on the ground that it was considered to be for the benefit of the institution in the sense that it put an end to disputes between rival Tambirans.

It cannot be justified on the analogy of a family settlement, because agreements as to filling up a religious office of importance in the eyes of Hindu worshippers raise very different considerations.

The position of a Chinna pattam is analogous to that of an ordinary reversioner with a mere *spes successionis* dependent on his surviving the Pandarasannadhi ; until he succeeds to the office, there can be no duty to question the right to succeed and any attempt to do so by a declaratory suit would probably fail.

Per *Napier, J.*—A trustee of a religious and charitable trust has in respect of a litigation not affecting the office, the same right of compromise that an ordinary trustee had ; and a compromise even of conflicting claims to an office is not necessarily unlawful or opposed to public policy; but must be scrutinised by the Court before which it is pleaded for the purpose of ascertaining whether it is in violation of the trusts of the institution or affects adversely the interests of the religious public.

A Chinna pattam can be removed for misconduct and so his right of succession is not absolute. Further the position of Chinna-pattam is one of greatly inferior sanctity and importance. So the right to sue to remove a person from the office of Pandarasannadhi under Article 120 of the Limitation act vests in the persons entitled to sue on the occasion of his taking that office, though the right to remove him from the office of Chinna-pattam vested at the time of the appointment to that office.

Kailasam Pillai v. *Nataraja Tambiran.* (*The Chief Justice and Napier, J.*) 271

———*Mutt—Permanent lease by the head of Mutt—Binding nature on successors—Matadhipati, legal position of in relation to mutts — Trustee for the purposes of the mutt—Limitation Act* (*IX of* 1908, *Art*) 134—*Permanent lease for a fixed rent—"Transfer for valuable consideration," within the meaning of the article—Knowledge by the transferee of the limited nature of the transferor's title, whether precludes the applicability of the article.*

The head of a mutt cannot in the absence of necessity bind his successors in office by a permanent lease at a fixed rent for all time.

The head of a mutt holds the property of the mutt as a trustee for the mutt or the institution and though he has large administrative powers, this trust does exist and must be respected.

Ram Parkash Das v. Anand Das (1916) I L R 43 C 707=31 MLJ 1, followed.

The position of the head of the mutt enunciated in *Vidyapurana Thirtha Swami v. Vidyanithi Thirthaswami* (1904) I L R 27 M 435 and *Kailasam Pillai v. Nataraja Thambiran* (1909) ILR 33 M 287 is no longer good law after the decision in *Ram Parkash Das v. Anand Das.*

A permanent lease for annual rent is a transfer for valuable consideration within the meaning of Art. 134 of the Limitation Act (IX of 1908.)

Ramaswami Mallia v. Sri Sri Jiur Thakur (1915) I L R 43 C. 34, *Narsaya Upada v. Venkatramana Bhatta* (1912) 23 M L J 260 followed.

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Knowledge of the limited nature of the transferor's title will not disentitle the transferee from taking advantage of Art. 134 of the Limitation Act; but it will be an important piece of evidence in judging what interest the transferee intended to take.

Ram Kani Ghosh v. Raja Sri Sri Hari Narayan Singh Deo Bahadur (1905) 2 C L J 546, followed.

Baluswamy Iyer v. Venkitaswamy Naicken, (Sadasiva Aiyar and Burn, JJ.) 24

Religious Office—Litigation as to—Compromise of—Validity—Compromise of dispute as to title to religious Office—Validity ... 271

Rent within meaning of Limitation Act—Mining royalties, if rent ... 357

Res Judicata—*Hindu Law—Widow—Suit under Limitation Act of* 1877 *for recovery of husband's property—Dismissal on question of limitation—Reversioner's suit after death of widow for recovery of same property—Maintainability—Distinction between Limitation Act of* 1859 *and Acts of* 1871 *and* 1877.

Where a suit instituted by a Hindu widow after the Limitation Act of 1877 came into force for the recovery of possession of her husband's property was dismissed on the question of limitation, *held* that a suit by the reversioners for the recovery of the same property after the death of the widow was not barred by *res judicata. HariNathChatterjee* v. *Mothurmohan Goswami* (1893) I L R 21 C 8, Expld. and distgd. *Khunni Lal* v. *Gobind Krishna Narain* (1911) ILR 33 A 356, Ref. to. *Hanuman Prasad Singh* v. *Bhagauti Prasad* (1897) I L R 19 A 357 Rel. upon.

Distinction between the Limitation Act of 1859 and the Acts of 1871 and 1877 pointed out.

Ramachandra Reddi v. Audemma. (Abdur Rahim and Srinivasa Aiyangar, JJ.) 627

———Rule of—Applicability to decision on question of law—Decision on Issue of mixed fact and law—Distinction 63

Review—High Court—Jurisdiction—Appeal under Letters Patent ... 144

Right to perform festival—*Ubhayakar—Daughter succeeding as heir—Marriage in another family—No bar—Onus—Usage—S.* 100 *Cl.* (*a*) *Civil Procedure Code—Scope of—High Court's power to review evidence.*

The right to perform a festival is a secular privilege and the daughter of an *Ubhayakar* is *prima facie* entitled to perfrom a festival in a temple and the fact that she is married in another family will not deprive her of the right. *Tangirala Chiranjivi* v. *Raja Mankiya Rao* (1915) 27 M L J 179; *Raja Rajeswari Ammal* v. *Subrahmanya* (1915) 30 M L J 222, followed.

There is no analogy between the holding of a subordinate trusteeship like Kattalai *dharmakartaship* and the performance of a festival.

The trustees of a temple are bound to receive the money to perform a festival and from whomsoever it may come. *Venganuithan* v. *Pandaneswara* (1882) I L R 6 M. 151 followed.

Where a special custom, by which none but males could perform such a festival, is set up, the onus of proof is on the party setting up such custom.

Right to perform festival—*Contd.* Page

Scope of S. 100 Cl. (a) of the C.P. Code regarding the powers of the High Court to consider evidence in proof of a custom, considered. *Nivath Singh* v. *Bhikki Singh* (1885) I L R 7 A. 650, 653, referred to.

Pankajammal v. *Secretary of State for India* (*Ayling and Seshagiri Aiyar, JJ.*) 237

Right to sue mortgagor for mortgage money—*Mortgage not enforceable as such, but accompanied by possession—personal liability of mortgagor, how affected by provision for repayment in a particular manner—Can such liability arise from wrongful acts of mortgagor preventing realization of security—Transfer of Property Act (Act IV of 1882) Ss. 59. 68—Practice—Non-appearance of respondent in Privy Council due to fraud of agent—*Ex parte *decree—Setting aside of—Reinstatement of appeal*

The plaintiffs were put in possession of certain villages under a usufructuary mortgage-deed providing for the payment of Rs. 1,30,000 with interest. On the expiry of the period limited in the deed they gave up possession. Thereafter they sued alleging that owing to wrongful acts of the mortgagor they had failed to realize a large part of their debt, and claiming a mortgage-decree for the balance or alternatively a simple money decree.

Held, that the nature and terms of the deed were such as to show that it was not originally intended that the mortgagor should be personally liable, but that such liability might have arisen subsequently under S. 68 of the Transfer of Property Act. The case was remitted for further trial to allow the respondents an opportunity of proving their allegations as to wrongful acts of the mortgagor, and of establishing that such acts rendered him personally liable.

Per Curiam, In considering the question whether a mortgagor is personally liable it must be borne in mind (1) that a loan *prima facie* involves such a personal liability (2) that such liability is not displaced by the mere fact that security is given for the repayment of the loan with interest but (3) that the nature and terms of such security may negative any personal liability on the part of the borrower. It must also be borne in mind that even if the mortgagor be in the first instance under no personal liability, such liability may arise under S. 68 (*b*) or (*c*) of the Transfer of Property Act.

The appeal was originally allowed *ex parte*. The respondent subsequently petitioned for its reinstatement, on the ground that they had been debarred from appearing by the fraud of their agent, who had misappropriated the moneys entrusted to him to enter appearance with. The appeal was reinstated the costs of the hearing thrown away being reserved.

Ram Narayan Singh v. *Adhindra Nath Mukherji* (*Lord Parker of Waddington*) *P. C.* 89

Sale of goods—*Contract with Austrian Firm through its agent—C. I. F. contract—Payment against tender of shipping documents — Outbreak of war—Effect of—Royal Proclamations—Contract becoming impossible of further performance—Contract Act, S. 56—Suit against a person in his capacity as agent—Personal liability, none.*

In May 1914, plaintiff entered into a contract with the defendant the Madras agent of an Austrian Firm, for the purchase of glass-bangles from

Sale of goods—*Contd.* Page

the Firm. Payment was to be made in Madras on arrival of goods, in exchange for shiping documents made out to the order of the shippers. Plaintiff accepted two drafts for the price of goods on 22-8-1914. England declared war with Austria on 13-8-1914, and the goods arrived in Ceylon on 15-8-1914 in an enemy vessel Two Royal Proclamations were issued on 5 8-1914, making it unlawful among other things "to act on behalf of an enemy in drawing, accepting..... or otherwise dealing with a negotiable instrument or to accept, pay, or otherwise deal with a negotiable instrument held by or on behalf of the enemy." The goods after their arrival were seized by the Government, but were formally releassd on 26-8-1915. The Bills of Lading were in the possession of the National Bank, Madras, who were to act as agents of the Austrian Firm for the collection of the drafts and for the purpose of making over the documents relating to the goods. The Bills were payable on 22-8-1914. In a suit by the plaintiff in 1915 for recovery of the goods from the defendant as agent of the Austrian Firm, Held, dismissing the suit, that the contract between the parties was a C. I F. contract under which the buyer was entitled to the documents of title only on payment of the money due under those documents and until then he had no right to the goods; that the agency of the National Bank for the purpose of delivering the documents on receiving the money due thereon must be taken to have been terminated by the declaration of war; and that the mere fact that the goods had arrived and were now in British India could make no difference in this respect as the further performance of the contract became impossible or unlawful within the meaning of S. 56 of the Contract Act.

Arnhold Karberg Co v. *Blythe, Green, Jourdain & Co.* (1915) 2 K. B. 379 ref. to.

Even if the effect of the declaration of war was merely to suspend the contract as regards the right to performance and right of action, the suit was still liable to be dismissed, having been brought during the continuance of the war. *Esposito* v. *Bowden* (1857) 7 E 1. and Bl. 763, G. C. *Sett* v. *Madhoram Hurdeodass* (1916) 33 I. C. 540 ref. to.

The suit having been brought against the defendant in his capacity as agent of the Austrian Firm, the Court would not, in appeal, give the plaintiff leave to amend the plaint so as to make the defendant personally liable.

Soorthingiee Sakalchand v. *Mahomed Nasurudeen* (*Abdur Rahim, Offg., C J. and Burn, J.*) 146

Second Appeal—Amendment of plaint in—Practice. 489
——High Court—Jurisdiction to consider evidence in proof of custom 237

Security—Deposit of Cash as Security for satisfaction of decree—Decree amount if charged on amount deposited—Distinction in case of security of specific property such as land 503

Small Cause Suit—Transfer to City Civil Court—Chief Justice—powers of 25

Specific performance—*Agreement to sell a share of certain items of family property by a member of joint family—Suit for specific performance of contract and partition against all the members—Civil*

Specific Performance—*contd.* Page

Procedure Code O. 1, R 3—Specific Relief Act, S. 27—Rights of the contractee under the agreement.

Where the first defendant a member of a Mitàkshara joint family agreed to sell his share in certain properties of the joint family, defendants 2 to 5 being the other members and the plaintiff instituted a suit for specific performance of the contract and for partition of the shares in those properties against defendants 1 to 5 and prior to the suit but subsequent to the agreement to sell, a partition decree was passed on compromise by which the properties agreed to be sold fell to the share of the other members.

Held (per Wallis, C. J., and *Srinivasa Aiyangar, J., Abdur Rahim, J. dissenting.)*—In a suit for specific performance of a contract by a member of an undivided Hindu family to sell his share, it is not permissible to join the other members of the family as defendants merely with a view to obtaining partition and possession of the alleged vendor's share as against them.

A partition involves the release of the interest of one of the co-parceners in the properties allotted to one of them and though by virtue of their prior title defendants 2 to 5 may be entitled to a release from the 1st defendant of his interest in the properties, the subject of the present suit, if these properties were allotted to them in a fair partition without their being affected by the contract to sell which can only operate subject to their rights, yet if the partition is proved to be a fraudulent design to defeat the rights of the plaintiff under his contract by the first defendant giving up the chance of the suit properties or a share in them being allotted to him in a fair division, defendants 2 to 5 may be treated as subsequent transferees with notice and would consequently be proper parties to the suit.

The right to sue for partition does not arise till after the legal title is transferred and when the suit was instituted in the present case, the plaintiff had no right to sue for partition at all.

Per Srinivasa Aiyangar, J.—If there was an existing cause of action for partition on the date of the suit, the question whether the two causes of action, the one for specific performance and the other for partition and possession can be joined in one suit, would depend not only on the provisions of O. 1, Rr. 3 and 5 which primarily regulate the joinder of parties but also of O. 2, Rr. 3 and 4 which provide for joinder of causes of action.

Per Abdur Rahim, J.—By reason of the wide language of O. 1, R. 3, the suit is not one which is bad for misjoinder of parties. That the suit is one for specific performance of a contract does not make any difference in the application of the Rule.

Applying S. 27 (c) of the Specific Relief Act to the facts of the case, defendants 2 to 5 are proper parties to the suit and specific performance can be enforced against them also.

Per Oldfield and Sadasiva Aiyar, JJ.—Where a member of a Hindu family agreed to convey a specific item of joint family property to another person, the latter is entitled to a conveyance by that member of the joint family of that item and such conveyance entitles him to demand a

Specific Performance—*contd.* Page

partition of the family properties and entitles him either to the specified property or to its equivalent from the other properties falling to the share of that member.

Observations in *Duvvur Subba Reddi* v. *Kakuturu Venkatarami Reddy* (1914) 16 M L T 370, dissented from.

Per Sadasiva Aiyar, J.—Where a plaintiff is directed to amend his plaint and he fails to so amend it, the plaint should not be rejected, but the court itself should exercise its powers under O. 6, Rr. 16 and 17 to strike and amend all matters which tend to prejudice, embarass or delay the fair trial of the suit and in such manner and on such terms as may be just.

Rangayya Reddi v. *Subrahmanya Aiyar.* (*Chief Justice, Abdur Rahim and Srinivasa Aiyangar, JJ.*) F. B. 575

Specific Relief Act, S 27—Hindu Law—Joint Family—Agreement to sell member's share-Suit for specific performance—Other members if and whenmay be added as parties—Partition in family subsequent to agreement and in fraud of purchaser's rights—Effect ... 575

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Transfer of Property Act, S. 82—*Contribution*—"*Contract to the contrary,*" *meaning of—Mortgage—Sale of portions of hypotheca to several persons with direction to pay off specific portions of the mortgage debt—Default—Liability of purchasers* inter se—*Contract Act, Ss.* 69 *and* 70—"*Bound by law,*" *meaning of.*

The liability to rateable contribution of properties mortgaged in the first instance and sold subsequently in lots to different persons is imposed by S. 82 of the Transfer of Property Act subject to the limitations therein laid down. The "contract to the contrary" contemplated by Cl. 2 of S. 82 is one between the subsequent purchasers of the mortgaged property *inter se* and not between the mortgagor and a purchaser of a portion of the property mortgaged.

Transfer of Property Act—*contd.* Page

Though a vendor does not lose his lien for unpaid purchase money by directing the vendee to pay off his debts, still the lien resides in the vendor himself and does not pass to third persons without a conveyance.

Ss. 69 and 70 of the Contract Act do not apply to claims for contribution arising under the circumstances mentioned in S. 82 of the Transfer of Property Act. The expression "bound by law to pay" in S. 69 means a legal and not a contractual liability.

A, hypothecated his properties to B. in 1895 and in September 1897 sold a portion of them to C, directing him to pay B, a sum of Rs. 1,200 towards the mortgage-debt. In 1897 A sold some other items of the hypotheca to D with a similar direction to pay Rs. 460. Finally A sold the rest of the hypotheca to E, who agreed to pay Rs. 2,000 towards the mortgage-debt due to B. Default having been made in the payment of the aforesaid sums, B brought a suit for sale against A, C, D, and E. and obtained a decree for sale. C. and D. paid the mortgagee decree-holder such portions of the debt as would, but for the undertaking, have been proportionately chargeable on the properties purchased by them, but less than the amount undertaken to be paid. E. who was the purchaser of the bulk of the properties had to pay considerably more than Rs. 2,000. In a suit by E, claiming contribution from C and D., *Held* that the claim was unsustainable under S. 82 of the Transfer of Property Act and also that Ss. 69 and 70 of the Contract Act had no application to the case.

Kunchithapatham Pillai v. *Palamalai.* (*Seshagiri Aiyar and Napier, JJ.*) 347

——**S. 99**—*Sale in contravention of—Voidable but not void—Objection not taken before the confirmation of sale—Equity of redemption extinguished.*

A sale in contravention of the provisions of S. 99 of the Transfer of Property Act is voidable and not void and if no objection is taken to the confirmation of the execution sale on that ground and the sale is confirmed, the mortgagor has no longer any right to redeem the mortgage.

Venkatayya v. *Surayya* (1903) I L R 30 Mad. p. 362. *Lal Bahadur* v. *Abaran Singh* (1915) I L R 37 All. p. 165 followed.
Arjuna Reddi v. *Venkatachala Asari.* (*Ayling and Napier, JJ*). ... 525

——S. 108 (j)—*Lessor and lessee—Rent—Mortgagee with possession from lessee, not liable for rent to lessor.*

A mortgagee with possession from a lessee is not liable to the lessor for rent, there being neither privity of estate nor privity of contract between the parties.

Authorities on the subject reviewed by the Chief Justice.
Nochulliyil Eazhuvan Theethisson v. *Eralpad Rajah styled Elaya Rajah Chief Justice and Spencer, J.*) 442

Transfer of suit from Small Cause Court to City Civil Court-Chief Justice —Powers of 25

Trespass—Successive trespasses—Right of real owner barred—right by prescription acquired by 1st trespasser or not 854

Trust—*Promissory note by trustee—Money borrowed for purposes of trust —Liability of trust estate.*

Trust—*contd.* Page

Where a trustee borrows money for purposes of the trust by executing a promissory note, the creditor is not entitled to a decree charging the amount due under the promissory note against the trust property.

Strickland v. *Symons* (1884) 26 Ch. D. 245 ; *In re Johnson* ; *Shearman* v. *Robertson* (1880) 15 Ch. D. 518 Referred to. *Srimat Devasikamani Pandarasannadhi* v. *Noor Mahomed Rowthen* (1907) I L R 31 M 47 not followed.

Swaminatha Aiyar v. *Srinivasa Aiyar.* (*Abdur Rahim and Spencer, JJ.*) 259

———Sale of trust property in execution of decree against trustee—Purchaser in possession—Suit by succeeding trustee for recovery of property—Limitation—Trustee empowered to take personal allowance out of income of properties—Effect 85

Trust Act, (II of 1882), S. 90—*Sale for arrears of Revenue, Act II of (1859)—Default by co-sharer leading to sale of estate—Purchase by defaulting co-sharer—Such purchase to be held for the benefit of all the co-sharers—Standard of reciprocal conduct to be exacted from co-sharers—Form of the decree—Duty of Counsel in* ex parte *cases.*

Where a co-sharer in an estate caused the sale of that estate by not paying his own proportion of Government revenue, and bought the estate himself

Held, that he took his purchase in trust for all the co-sharers.

The relative position of co-sharers in respect of the payment of revenue demands from each such measure of candid dealing and good faith as will ensure that a sharer is not tempted to make a deliberate default with a view to ousting his co-sharers and appropriating to himself their common property.

Where an appeal is heard *ex parte* it is the duty of Counsel to bring to the notice of the Board adverse as well as favourable authorities.

Form of the decree considered.

Deonandan Prashad v. *Janki Singh* (*Sir Lawrence Jenkins*) *P. C.* ... 206

Vendor and purchaser—*Marketable title—Effect of recitals in deeds—After what time they should satisfy a purchaser of the truth of the fact recited—Conditions in contract of sale—Title by limitation.*

Where property had been mortgaged to A and B, the vendors under a contract of 1913, in order to prove that such mortgage had been paid off, produced a release of 1902 by B, which recited that A had died leaving B his sole heir. The purchaser asked for independent proof of the facts recited, but the vendors declined to furnish any. The purchaser thereupon refused to complete.

Held, that his refusal was justified, and that the vendors had not deduced a marketable title.

Shrinivasdas Bavri v. *Meherbai.* (*Lord Parker of Waddington*) *P. C.* 175

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Commercial Press Madras, S. E.

THE

Madras Law Journal Reports.

SUPPLEMENT

1917 Vol. XXXII. 1917

IN THE HIGH COURT OF JUDICATURE AT MADRAS. [FULL BENCH].

Present:—Sir John Wallis, Chief Justice, Mr. Justice Ayling and Mr. Justice Kumaraswami Sastri.

Seshachala Chetty and others ... *Appellants* * (*Plaintiffs Nos. 1 and* 3 *to* 6.)

v.

Para Chinnasami and others ... *Respondents* (*Defendants Nos.* 1, 2, 3, 5, 7, 8, 9, 11, 12, 14 *and* 15.)

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Seshachala Chetty *v.* Para Chinnasami

Mirasi Village—Gramanattam—Rights in, of Government and of mirasidars—Grant of nuttam on patta by Government—Mirasidar's suit for recovery of nuttam—Proof—Onus—Quantum—Rights over waste generally—Recognition of mirasi right by the State—Proof—Quantum—"Double entry system"—What is.

Per *The Chief Justice*: The question whether unoccupied nuttam in a Mirasi Village is the private property of the mirasidars or not should be decided on the evidence in each case and with special reference to user. There is no general presumption of the mirasidars' ownership of the nuttam in the absence of evidence of user, but where user is shown the presumption of ownership readily arises.

Before the advent of British rule and especially under the Muhammadan rule unoccupied nuttam was not generally recognised by Government as the private property of the mirasidars and their ownership has not been established subsequently either by Government recognition or by judicial decisions.

Per *Ayling, J*:—The mere fact that certain persons are the mirasidars of a village neither carries with it the right to recover possession of a house site in the village held under a patta from Government, nor does it even raise a presumption of the existence of such a right. The rule is inapplicable to cases in which a mirasidar has, prior to the grant by Government, already acquired a title to the particular site either by previous grant or prescription. It does not also preclude the mirasidars of a particular village from showing that in that village they have acquired by prescription a title in the nuttam generally as against Government which would include the right in question.

* S. A. No. 210 of 1911. 17th February 1916.

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Enumeration of incidents of mirasi tenure.

Although all the incidents may have a common origin in the status of the mirasidar, none of them necessarily involves another. Each requires to be separately established: and recognition by the state, whether express, or implied, is an indispensable condition for the enforcement of each.

The burden of proof of recognition of mirasi right by the state rests on the mirasidars.

Where it is clear that the right claimed tends to the prejudice of a purpose to which the property is admittedly dedicated, it is the duty of a court to require very strict proof before giving a decree in its favour.

Quaere whether at the present day Government would pay compensation to the mirasidars of a village for cultivable waste therein acquired by it.

Per *Kumaraswamy Sastri*, J.—In mirasi villages the rights of Government over waste (including nuttam and cheri) are subject to the rights of the Mirasidars;

2. The nature and extent of such rights are not uniform throughout the Presidency but vary, and the onus is on the Mirasidars to prove that any specified incident attaches to Mirasi rights in any particular district, there being no presumption that Gramanutham is the exclusive property of the Mirasidars.

3. The rights of Mirasidars over waste are not extinguished by the mere fact that the Government grants pattas to strangers.

Origin, nature and incidents of mirasi tenure and effect of Act III of 1905 considered.

"Double entry system" explained.

Second Appeal against the decree of the District Court of Chingleput in Appeal Suit No. 245 of 1908, preferred against the decree of the Court of the District Munsif of Poonamallee in Original Suit No. 9 of 1905.

This Second Appeal came on for hearing on Wednesday, the 4th day of December 1912, and Wednesday and Thursday, the 27th and 28th days of August 1913, and having stood over for consideration till Thursday, the 9th day of October 1913 the Court (Sankaran Nair and Sadasiva Aiyar, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

Sankaran Nair J.

Sankaran Nair, J.:—The question that arises for decision in Second Appeal, has reference to the respective rights of the Government and the mirasidars in the waste lands, including house sites in a mirasi village.

In the old village accounts and in the discussion on the question these lands are referred to under certain designations:—

Poramboke:—Includes the *nattam cheri*, *i.e.*, the residential quarters of the village, rivers, tanks, watercourses, waters, roads, burning places.

Tarisu:—*Waste*, is of two kinds; *Seykal Karambu*—cultivable waste; *Anadi Karambu*—immemorial waste.

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The suit was brought by the plaintiffs who claim as mirasidars owning two shares out of three in a village in the Chingleput District. They say that the land in dispute, which is a homestead, is their ancestral property held under them by the 13th defendant. They allege trespass on their land and seek to recover possession of it. On the allegations made by the defendants, persons in possession, that they held under Government, the Secretary of State was made the 15th defendant. In the written statement the Government admitted that the land forms part of the *gramanattam*, but contended that neither the plaintiffs nor their predecessors, who are the mirasidars of the village, have any proprietary right to the *gramanattam* and other poramboke lands in Government villages, and that they vest in the Government. On this issue was framed, "whether the mirasidars of the plaint village have proprietary right in village sites and other poramboke lands?." Both the lower courts have dismissed the plaintiff's suit. This is an appeal from that decision. The lower courts were of opinion that the claims of the mirasidars to waste lands have been finally negatived and the Government's title established by the judgments in *Sivanatha Naicken* v. *Nattu Ranga Chari* [1] and *The Secretary of State for India* v. *M. Krishnayya* [2] and they accordingly considered only the question whether the plaintiffs have established a title by prescription against Government. They found the following facts proved. The plaintiffs purchased their mirasi property under Exhibit J., dated the 28th May 1891, from a previous mirasidar. The title-deed conveyed to them the entire property in the land conveyed. It conveyed in terms the village site, *cheri* site, as well as wells, tank, pond, river channel, waste lands and all other rights and privileges pertaining thereto. Their predecessor purchased the property under Exhibit H., (1887), which also conveyed all the waste lands etc. Exhibit H makes reference to a deed of partition of 1853 and a prior document of July 1822 as title-deeds. The deed of partition was produced in court, but as it was not produced at the proper time the judges rejected it. The lower courts attached no weight to Exibits H and J, as the Government was not a party to them. It is also proved that in 1894 the land was actually cultivated under the plaintiffs. The lower courts did not attach any weight to this circumstance, as at that time there was an application before the Collector by a Christian Missionary for lands in the Mirasi village and this cultivation was treated simply as an attempt to create evidence of enjoyment. But this fact does not deprive it of its value and shows that the plaintiffs did exercise an act of possession at that time when their title was disputed. Again, in 1902 the plaintiffs let a tenant (plaintiff's witness No. 3) into possession. This was after the grant to the defendants by the Government. A thatched

1. (1903) I. L. R. 26 Mad. 371. 2. (1904) I. L. R. 28 Mad. 257 at 267.

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hut was put up for supplying liquor to the pariahs residing there. Exhibits E and G, no doubt, cannot be treated as evidence of title in these circumstances, but these seem to be certainly evidence of possession. It is also found that the plaintiffs cut branches of trees. This also is explained on the ground that it does not amount to an act of ownership but that it is a common privilege of mirasidars. There is no counter-evidence of possession or of title. Now, it seems clear on these facts that, though they might not be sufficient to support a title by prescription only, if the mirasidars are the owners of the lands including the waste in their village, they have proved such possession as the nature of the land admits of, and *prima facie* therefore they would be entitled to recover.

But it is argued that the mirasidars of a village have no right in waste lands or in the homestead, *nattams* or *cheris* included in the limits of the village. They might have certain privileges, but such privileges are put an end to when the Government interferes with the possession of such land. This is the plea that is upheld by the lower courts, and that is the question which arises for consideration in second appeal. The right that is claimed is on behalf of the village community, that is, of the mirasidars as a body, each miraeidar having a share in the village. In determining this question, it is first necessary to bear in mind that a village was not a mere administrative unit.

We have now got ample information about the village community in Mr. Huddlestone's Mirasi Papers (an abstract of it is given by Mr. Baden Powell in his Indian Village Community, pages 361 to 379), in the correspondence relating to the revision of village establishments, both official publications, and in the volumes of South Indian Inscriptions with reports, also being published by Government.

The following facts appear so far as the Tamil land is concerned. The country was divided into villages. A village, geographically considered, was a tract of country comprising some hundreds or thousands of acres of arable and waste lands; politically viewed, it resembled a corporation or township. It had its *nattams*, plots of lands set apart for house-sites for caste Hindus, *cheries* for the labouring classes, and also portions set apart for other castes. It had its own officers or servants to collect the revenue payable to Government, to repress crime, to guard the crops, to preserve the boundaries, and the superintendent of the tanks and water-courses to distribute the water therefrom for the purposes of agriculture. "Under this simple form of Municipal Government the inhabitants of the country have lived from time immemorial. The boundaries of the villages have been seldom altered and, though the villages themselves have been sometimes injured, and even desolated by war, famine and

disease, the same name, the same limits, the same interests, the same families have continued for ages. The inhabitants give themselves no trouble about the breaking up and division of kingdoms, whole villages remain entire, they care not to what power it is transferred or to what sovereign it devolves ; its internal economy remains unchanged." This description, taken from the Fifth Report of the Committee of the House of Commons, has become classic and is a true description of a typical village in Southern India when the East India Company acquired.

The ancient deeds of transfer, of which we have copies, fully bear out, like Exhibits H and J, the title of the members of the village community or mirasidars to the lands in the village. Many documents are published in the Papers on the Mirasi Right with Notes, by Mr. Bayley and Mr. Huddlestone. In one deed, copy of which is printed at page 263," the *uncultivated land* within the limits of our village" is granted by the mirasidars for being brought under cultivation. *Manai* which means house-site or *natham*, *kollai*, which means homestead, and which is a small enclosure near the house, *paracheri* or the suburbs set apart for pariahs, *pizhakkadai* (the backyard immediately adjoining the house), *mavadai maravadai*, meaning all kinds of game and woodland, all these are expressly granted. The notes by the experienced Revenue Officer who edited those papers and explained these terms are very instructive—see pages 262 to 342. Some of these were executed shortly before the East India Company acquired the Government of the country but others were later. The deeds in the book on Mirasi Papers are confined to Madras and its suburbs. But the inscriptions which are now being published show that elsewhere in the Presidency it was the same. The volumes of South Indian Inscriptions supply ample information on the point. I will only refer to one or two by way of illustration. In the inscription which is printed at page 115 of volume 2 part II of the South Indian Inscriptions, we find among the properties sold the village site (*gramanatham*), the place used for the pasture of the cows (*gopracharabhumi*) *vellannatham*, the land which includes the land of the cultivator, ponds, channels, hills, jungles and mounts ; and the extent, according to the survey of these items, is given. It gives the trees over-ground and the wells under-ground with rights of alienation. In another grant we have *oornatham* (village site) *kulam* (pond), *vaikkal* (channel) passing through the villages, the *paracheri*, *kammalacheri* and burning ground (*chudukadu*). I have selected these two inscriptions at random

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out of a mass of inscriptions which are printed in these volumes, which go to tell the same story, *i.e.*, in ancient days the grant conveyed the entire property in the village of every kind and form. These title-deeds published in the Mirasi Papers, and the deeds that come frequently before the courts, refer to the eight incidents of ownership which are conveyed by them. They are explained in the Mirasi Papers at page 206. *Pashana*, one of these eight incidents conveyed, means mountains, rocks and their contents, *i. e.*, mines and minerals and has always been understood to show that even waste lands were conveyed. See Sheristadar Sankarayya on this point at page 221. Some of these grants were made by the Rajahs themselves. Whenever the King wanted to bestow waste lands or any extent of land within the limits of a village, he purchased them from the mirasidars; otherwise, the donee obtained only the Government share. Sheristadar Sankarayya states that this has been the practice in the Shozha country in the village of Needamangalam, Callanei and many others. See Mirasi Papers, page 220. The Inam Commissioner, whose proceedings form an enclosure to G. O. No. 2346, Revenue, dated the 23rd December 1861, stated that in Tanjore "when the Rajahs of the country granted *waste* lands in *inam*, they generally purchased or obtained in gift the mirasi right of the lands from the mirasidars and conferred it on the *inamdars*. Another arrangement sometimes made with the same object, was to confer a portion of the *inam* on the mirasidars of the village in compensation for their rights over the waste land which was given in *inam*. This was done either by grants or subsequently by the grantees." This report is of special importance as it was made with a view to obtain the order of the Government as to how such lands are to be dealt with. This seems decisive, so far the documentary evidence.

But after a century of British Government, these ancient deeds can only be relied upon to explain and support the rights of the village communities, where they have succeeded in preserving their rights. When the East India Company took possession of the country, the village communities were in a state of disintegration. Some villages were held as joint property, the entire produce being divided among the mirasidars in certain defined shares. In some other villages, all the lands under cultivation were divided, but the waste lands etc., were held as common property. In certain other villages, the lands under cultivation and some arable waste were divided and the rest of the lands were held in common. The ryotwari settlement which was introduced by the East India Company, was practically destructive of this communal holding of property. The Government as far as possible entered into direct relation with the ind dual

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proprietors. Pattas were issued to each ryot and the land which the pattadar was to cultivate in the ensuing year was entered therein, and if he was unwilling to cultivate any land, he had to surrender it to the Government. Again, the policy of the Government was to enter into direct relation with the actual cultivator. The rights of the mirasidar, therefore, as a middleman were recognised as little as possible. The village autonomy was thus destroyed. The old boundaries were lost; many villages were often clubbed into one. The old hereditary village officials became, or gave place to new, Government servants. The oppressive character of the revenue assessments in the early years of the last century, the comparative frequency of famines and seasons of scarcity led to the abandonment of villages. Consequently, it is now difficult to say whether there is any presumption of mirasi right in any District or to what extent the village community have succeeded in preserving their rights. They survived, generally speaking, in those Districts, Chingleput and Tanjore in particular, in which the Collectors respected ancient native rights, though from other Districts also cases often come before the courts in which the village community have successfully asserted their claims. The presumption will also vary with the kind of waste in dispute. I shall briefly refer to the recognised authorities. Mr. Ellis, who was a Collector whose opinion is referred to always with respect on this point, recognised the full ownership of the mirasidars in the lands of the village. According to him, when they cultivated the lands themselves, they paid the Government revenue. When any non-mirasidar cultivated, he paid *Tunduvaram* to the mirasidar. From him all the mirasidars received also certain fees. He was of opinion that the mirasi right also extended to waste. He distinguished between culturable waste land, that might be brought under cultivation, and immemorial waste, see page 184. He said that the mirasidars had as much right in the culturable waste as they had in the lands under cultivation paying revenue to Government. They might cultivate it or cut wood, but in the case of immemorial waste, though they had the right of cutting wood, grazing their cattle and quarrying, they had no right of cultivation and could not break up the pasturage or cut down productive trees without the consent of the Government. He also pointed out that mirasi right was saleable (when he wrote) and that such sales were of shares in the villages, Mirasi Papers pages 205, 207. This was also the opinion of Sankarayya, who was for many years Sheristadar in the Huzur Kutchery at Madras. Mr. Ellis was also of opinion that, if the Mirasidars declined to take up culturable waste for cultivation or failed to make any arrangements for it, it was open to the circar to give it to strangers for cultivation, though the mirasi

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right would not be thereby extinguished. The mirasidar would be entitled after any lapse of time to claim those lands himself. The other District officers who were consulted, agreed generally with these opinions, though there were differences between them in detail. The opinion of Ellis was first accepted by the Government of Madras and the Board of Revenue and was printed and circulated for the use of the service at large. See Mirasi Papers, page 344; but Sir Thomas Munro who became the Governor of Madras afterwards, disagreed with it, and he recorded his opinion in his minute of the 31st December 1824, and in all the subsequent discussions the question has generally assumed the form, which of them is more reliable. Sir Thomas Munro wrote that the view taken by Mr. Ellis and others, that the mirasidar of *wet* land was bound to pay rent only for what he cultivated, is wrong, and that, if he left any land uncultivated and the Government gave the land to another person for cultivation, the mirasidar had no right to exact from him the landlord's share or rent, though the mirasidar might have still the privilege for a long, though not clearly defined, term of years, of recovering his land from the Government tenant on consenting to pay the rent. As regards the waste lands, he stated :—

"The waste in Miras villages in Arcot is supposed by Mr. Ellis to belong to the Mirasidars jointly; and he supports his opinion by documents showing that, when a mirasidar sells his cultivated lands, he transfers by the same deed to the purchaser his right in the produce of the waste, the quarries, mines, fisheries etc., within the limits of the village. But this appears to be a mere technical form, which can give no actual proprietary right in the waste. It is used in villages where there is no waste, as well as where there is, and may be used where there is no miras. It confers a right, but not the right of ownership, to the pasture of the waste lands, and the fishery of the tanks and nullahs, in common with the other mirasidars of the village. The same right exists everywhere. In those parts of the Deccan where Miras is unknown, the ryots of every village reserve the fishery and pasture to themselves, and drive away the cattle of strangers, and derive just as much benefit from the waste as those of miras villages. Such a right seems to be a natural one everywhere, and it is accordingly assumed by the ryots of every village without its being supposed that any formal grant is necessary for the purpose." He added afterwards: "It has been supposed that in miras villages in Arcot, in the original compact between the circar and the 1st settlers, the exclusive use of the waste was secured to those settlers: but it has already been shown that, in all villages, whether miras or not, the inhabitants reserve to themselves the exclusive use of the waste. But this right is good only against strangers, not against the circar, which possesses, I think, by the usage of the country, the absolute right of disposing of the waste as it pleases, in villages which are miras as well as in those which are not."

Sir Thomas Munro is, no doubt, right in saying that the mere fact that the deeds of conveyance referred to the waste, quarries, mines and fisheries would not convey any title if the vendor was not entitled to them, but, where it is accompanied by the exercise of rights of ownership, then they form strong evidence of title. It is stated in the

same extract that the ryots of every village reserved the rights of pasture and fishery to themselves; the right of exclusive enjoyment is, of course, one of the main incidents of ownership. Again Mr. Ellis states that the mirasidar used to exercise the right of quarrying. This is almost a conclusive test of ownership. Other acts of ownership will be referred to later. Sir Thomas Munro states, no doubt, that certain rights referred to by him were exercised and these deeds of conveyance executed in this form, not only by the mirasidars but also by those village communities where no mirasi right prevailed. That only shows that, after the village communities in non-mirasi villages lost certain rights, they still retained others with that form of conveyance; but, in so far as any rights have been asserted and exercised, these deeds support the view that they were based upon ancient usage. Sir Thomas Munro also says "The circar from ancient times has everywhere, even in Arcot as well as in other provinces, granted waste in *Inam* free of every rent or claim, public or private, and appears in all such grants to have considered the waste as being exclusively its own property." It is undoubtedly the fact that there are many ancient grants by rulers conveying waste in Inam etc., and they show *prima facie* that the waste was Government property at the time of the grant. A large number will be found in the South Indian Inscriptions and a few in the Mirasi Papers. But Sir Thomas Munro seems to have been unaware of the fact that, when in ancient times the circar granted waste in *Inam* free of every rent or claim generally, it was after purchasing the property from the mirasidars. We cannot ignore the statements on this point of Sankarayya or the Inam commissioner, to which I have referred. This suggests an inference, as I have pointed out, exactly contrary to that drawn by Munro. Further the fact that Government granted the waste lands to village communities, shows not only the title of the latter to the waste lands but raises a presumption of a lost grant in every case of village community in possession of waste. So, if I had to form an opinion as between Sir Thomas Munro and Mr. Ellis at this distance of time, I should hesitate very much to accept his (Sir Thomas Munro's) view in opposition to that of Mr. Ellis and the other District Officers. But it appears to me that the question is concluded by authority, and that Sir Thomas Munro's view has been considered and authoritatively rejected by the Civil Courts and also by the Government. His opinion was recorded in 1824. The question soon came up for consideration before the Civil Court. As between the Government and the mirasidars, the nature of the Mirasi right was considered in Cause No. 90 of 1836 in the Zillah Court of Chingleput and in appeal from that decision. The plaintiffs therein claimed

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to be the mirasidars of the village, and their case was that there were 164 and odd cawnies of uncultivated land in the village, out of which the Collector, the first defendant, granted under a cowle to the plaintiffs 40 cawnies, and by another cowle to others who did not belong to the village, 80 cawnies. The plaintiffs, being unwilling that persons who had no mirasi in the village should have possession of any part of the waste land, offered to take the whole of the 164 and odd cawnies and give security for the revenue. The Collector, however, refused to do so and gave a portion of the land to the seventh and other defendants. The plaintiffs denied the right of the Collector to give away such land. The Collector contended that the land was waste, and that he had the power of granting cowle to any person who was willing to undertake to bring it under cultivation. On this question, this is the finding of the Judge—

"From the evidence in this case, it is quite evident that the plaintiffs alone are the Mirasidars, and that the 7th defendant and others have no Mirasi right whatever in the village. That the Mirasidars alone have a right to sell and mortgage *varapat* land, and that to every Mirasi share there is a certain portion of waste land attached, but the particular parts of the waste land which belong to each individual Mirasi share is not actually known because those waste lands are seldom if ever divided, are facts which have been established by the evidence of witnesses in numberless cases before this Court; and *as no one ever attempted to dispute the inherent right of Mirasidars to the waste land*, it is evident that, without the consent of the proprietors of the soil, the Collector has no authority to deliver any part of these lands to other persons." Papers on Mirasi right 461.

There was an appeal from that decree to the Provincial Court, and the Collector relied, amongst other grounds on the opinion of Sir Thomas Munro, already referred to, that "the right of the Mirasidars to the waste was good only so far as to preclude strangers from grazing and exercising other rights of common in the village but, that the circar possessed, by the usage of the country, the absolute right of disposing of the waste as it pleases in villages which are Mirasi, as well as in those which are not." See page 465, Mirasi Papers. The appellate court upheld the right of the Mirasidars to the village waste. The following is the material portion of the judgment. See pages 466-467.

"The first point which calls for notice in the argument of the appellant, is the objection taken to that part of the Zillah Judge's decree which asserts that "the right of the Mirasidars to the immemorial waste lands has never been disputed"; this averment of the Zillah Judge appears in entire accordance with the law of *Mirasi* as laid down by Mr. Ellis, while the contrary position of the appellant that in fact "the immemorial waste is the absolute property of the circar," is not only incompatible with his views, but also incompatible with the possession on the part of the Mirasidar of any property in the soil whatever. Mr. Ellis says "Mirasi right, wherever it exists, certainly extends to waste lands,"

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"In the *Anadi Karambu* or immemorial waste though the mirasidars possess the exclusive right of cutting firewood, working quarries etc., they have no right of *cultivation*, much less can they claim to break up common used for pasturage, or to cut down productive trees etc." "Mirasi right is confined *to the use* of these as they exist; no alteration can be made with respect to them by the Mirasidar. I mean that they have no inherent right to do so. With the consent of the circar, any beneficial change in the appropriation of lands may take place, and a correspondent alteration may be made in the Tarapadi accounts; thus, if part of the *anadi karambu* lands be reclaimed, or a road in the *Poramboke* be stopped up and cultivated, the extent must be transferred from this head to that of *varapat*" (*varapat*, lands under wet cultivation paying revenue). The restriction contained in the foregoing has no reference whatever to a limitation of right (as property), but to the power of its conversion except for beneficial purposes, the Government having a voice in the case of such conversion, being equally interested as the Mirasidars in its effects. If a Mirasidar be so reduced in circumstances as not to be able to bring under cultivation his share of the *Varapat*, or if he should have abandoned agriculture for other pursuits, it is incumbent on him to provide for its culture by granting to *Payakaries* such terms as will induce them to bestow on it the advantages of their stock and labours. If he do not do so the state has then a right to employ *Payakaries* either for the current year, or for a fixed, not an *indefinite*, number of years, and perhaps to resume his *Mirasi swatantrams* in proportion to the extent of land he has neglected to cultivate." The *Mirasi* tenure seems almost indefeasible, every possible allowance and expedient having been in practice to prevent its alienation from the original possessor. B. Sankarayya, whose views of Mirasi are recorded with those of Mr. Ellis, says "as waste lands are included in the *Gramataram*, all such lands have been considered to appertain exclusively to the Mirasidars." The same authority, speaking of the right of the circar to provide for the revenue where the Mirasidar makes default, says "If, therefore, the Mirasidars fail to cultivate, and loss thence accrues to the State, the circar enjoys and exercises the right to cause the lands to be cultivated and to issue *cowles* for the purpose." Although many authorities concur on this point, I have not met with one which vests in the circar power over Mirasi lands further than is necessary for the temporary protection of the revenue, in default of its being provided through the means of the Mirasidar; nor have I found any authority which distinguishes the right over waste (as property) and cultivable land, except in the purpose of their respective application. Every village has a certain portion of waste land attached to it, which neither the mirasidar nor the Government can break up unless for mutual benefit. *Mirasi* is founded on immemorial usage, from which neither the Government nor the ryot has power to depart in any respect unless for a beneficial change." Pages 466, 467, Papers on Mirasi Rights; and the conclusion, are stated in the following terms. "The document granted by the Collector and which is denominated a *cowle*, is an entire annihilation of the right of the plaintiffs. It conveys the lands in prepetuity to *Payakaries* without respect to the mirasidar's claim; it assumes the right of soil to be in the Government, instead of the mirasidar and it does not even recognize *mirasi* as a distinction, much less *its claims*. The circumstances which would have justified even temporary alienation of the land by the Collector to the *Payakaries*, are all wanting in the case. The act was not necessary as a protection of the revenue, as the plaintiffs offered security for its full payment whether they cultivated the land or not. Their offer (Document No. 60) is dated 20th May 1835 the *cowle* to the 7th and 9th defendants is dated 15th June of the same year. If the waste in question were convertible into cultivable

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it is quite clear from the authorities quoted that, on its conversion from the *Anadi Karambu to Varaput*, it ought to have been entered as such, in the *Terapadi* accounts of the village, and then divided among the mirasidars according to the manner in which the rest of the village was shared among them."

I have referred to this judgment at some length, not only because it deals fully with the question, but discards the opinion of Sir Thomas Munro when it was specially relied upon—see the memorandum of appeal—and adopts the views of Mr. Ellis. (Papers on Mirasi right page 462). The Court of Directors accepted this ruling. While the question was pending before the Provincial Court, they stated the rule to be that, whenever the waste lands of a mirasi village were proposed to be given to any other than the mirasidars the proposal should, in the first instance, be communicated to them, to whom, in the event of their being willing to cultivate or to give security for the revenue assessable on the lands, the preference should be given. They added "we consider that the Government has a clear right to the revenue to be derived from the conversion of waste lands into *arable*." It will be noticed here that the only claim asserted on behalf of the Government was the revenue of the lands, and that, if security was given for the payment of the revenue, then no right of interference was claimed.

The Court of Directors claimed only that right in dealing with waste lands in revenue interests which was claimed by Munro in wet lands. It would have been otherwise, of course, if the Government had claimed the proprietorship of the waste lands. After the decision was given, they reiterated this opinion in 1844, and they added, "The question still remains undecided, whether Government possesses the right, in the event of the Mirasidar refusing to cultivate or to give security for the revenue, to alienate waste lands in Mirasi villages to Paracoody cultivators." It will be noticed that the decision of the Provincial Court above referred to only justified a temporary alienation of lands by the Collector as protection of the revenue as in cases of land under cultivation, and it did not recognize any right when the plaintiffs offered security for its payment, whether they 'cultivated the land or not.'

In the next case that may be referred to, Appeal Suit No. 100 of 1849 in the Civil Court of Chingleput, it was dicided that the Mirasidars have no right to levy *swatantrams* or fees from Payakaries who do not hold from them, but who have at their own expense brought immemorial waste into cultivation under cowle granted by the circar. It is stated by the Judge who decided that case, that this point had been frequently decided in the negative, to which observation there is a note appended by the Member of the Board of Revenue who published that judgment that, " it would have been better had the Civil

Judge quoted the cases;" but, whether the Judge was right or not, he does not decide the question under consideration, because it may be that the owner of the land has no right to receive *swatantram* from trespassers. He may eject them or get mesne profits, but the fees he may not be entitled to get.—Papers on Mirasi Right page 484.

Whenever the question was brought before the Courts, the ownership of the Mirasidar has been consistently upheld. In the case which is referred to in the Mirasi Papers, page 487, the Sudder Court says in 1849, "The Mirasidars are the acknowledged hereditary proprietors of the soil,"and it upholds their claim to recover property against the person in possession who was a pattadar himself paying revenue to Government. In page 119, Sudder Decisions of 1850, where the defendants held on pattas issued by the Collector of the District, the law was thus laid down by the Sudder Court, "The Court of Sudder Adalat are also further of opinion that the law as laid down by the Civil Judge, relative to the Government officers having authority unreservedly to dispose of any lands situated in a Mirasi village that may be left waste for a period of years, is erroneous, no such right being claimed by the Government by whom the prescriptive-rights and privileges of the Mirasidars are upheld." In a case reported in the Sudder Court Decisions of 1854 page 140, the Sudder Court recognized the proprietary right of the Mirasidars and their right to possession on such basis.

This was in 1854. These decisions, it appears to me, are in conformity with the orders of the Court of Directors, which recognise the ownership of the Mirasidars and the right of Government to give the land to strangers when it becomes necessary in revenue interests to do so, a right claimed equally with reference to wet lands.

When the survey and settlement of the Presidency was undertaken, the Court of Directors on the 17th December 1856 directed the Madras Government to act in accordance with their previous declarations already referred to—see page 556 Mirasi Papers. When a Mirasidar in Tanjore, dissatisfied with the local authorities, civil and criminal, ventured to submit a memorial to the Court of Directors, the Madras Government recognised his claim to the waste land, dissented from the Board's view that it was open to Government to give the land to whomever they liked, and held "that the best authorities were agreed that in Mirasi villages the Miras extended to waste as well as to arable land—" 22nd December 1856. Even in non-mirasi villages the Court of Directors would not assert Government ownership. Their conclusion is stated in G. O. No. 667 of the 27th May 1856. "The waste land in this country, in the villages of the plains at least, is certainly not the property of Government or the State, in the absolute

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sense in which the unoccupied land in the United States and some of the British colonies is so. The village communities claim an interest in it and that interest has been universally admitted though not accurately defined. To put up the waste to sale, entirely ignoring that prior right of the village communities, would be to introduce a totally new practice; and it would certainly be regarded by the common feeling of the country as an invasion of existing rights." See also G. O. of 5th June 1857.

In Madras itself the Collector reported in 1855 "the Mirasidars have been in the habit of selling the waste lands of this collectorate and claiming mirasi in them" and in that year the Revenue Officials denied their right only to immemorial waste, a claim, however, which they gave up on the opinion of the Advocate General that it was unsupportable. See page 511, Mirasi Papers. Finally there is a decision in 1862. The Sudder Court laid down, "Adverting to the admitted fact that Tolavoor is a Mirasi village, it follows as a necessary corollary from this judgment that the defendants are themselves mirasidars, and that they possess a right to all the privileges incident to a proprietary right of this character including the title to a share of Samudayam or common lands." (See page 51, Decision of Sudder Court, Madras, 1862).

These decisions, it appears to me, are binding upon us, and they fully recognise the ownership of the mirasidars in all the lands in the mirasi village including the waste. They recognise also the right of the Government, in cases where the mirasidars refused to cultivate the lands, waste or under cultivation, to let them to another for temporary cultivation. Whether in such cases the mirasidar retained his mirasi right, either to recover *swatantrams* of his from the tenant let in by the Government or to turn him out, was a question apparently not settled.

In 1864 the Revenue Recovery Act (Act II of 1864) was passed. Under this Act it has been finally decided that the Government have not the right to assign the waste land to a person for cultivation on the ground that the owner of the land does nat cultivate it or pay revenue which the new pattadar offers to pay to Government. In *Secretary of State* v. *Ashtamurthi* in fact the argument advanced was that as the State is entitled to a share of produce in every cultivated land, and if the land that is now waste is given to a new pattadar for cultivation the Government would derive its shares of the produce, the true owner cannot be allowed to defeat that alleged right of the Government to get the share by refusing to cultivate it himself and not allowing Government to give it to another. This argument was rejected, and it was

1. (1888) I. L. R. 13 Mad. 89.

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held that the Government had no right to let in a new pattadar into possession, and that, if such pattadar was let in, the true owner might turn him out and obtain possession, and, therefore, that, if the land was sold for revenue which might not have been paid by the new pattadar, the purchaser would get no interest in the property. This decision has been repeatedly followed and is considered to have finally settled the question. That they have no such right to deal with ordinary ryotwari land under cultivation is now settled. The only remedy is sale for arrears of revenue. All the decisions, therefore, prior to 1864, which I have noticed and which recognized the right in the Government to put a new pattadar into possession if the mirasidar let the land waste, must be disregarded after the passing of Act II of 1864, if a mirasidar is the true owner of the land; and the decisions to which I have referred leave no room for doubt that he was recognised as true owner, and the right of Government was recognised by the decisions and by the Court of Directors only as a right for the protection of the revenue and not as ownership of the land.

In considering what took place subsequently we need therefore trouble ourselves only with the question of ownership of the mirasidar. In 1870, the Government in its G. O. No. 796, dated the 1st June 1870 put forward their claim to appropriate immemorial waste lands in mirasi villages for State purposes without reference to the mirasidars. From this it was held to follow that the claim for compensation for poramboke lands also was untenable.

In 1872 the whole question was again referred to the Collectors for report with reference to the *gramanattam* in non-mirasi villages as well as in mirasi villages. On a consideration of the reports received from all the Collectors, the Board of Revenue stated their opinion in these terms:—" the true view of the case is that *gramanattam* is the communal property of the villagers, and that the Collector can only interfere with a view to benefit the community and when his action is consistent with the common law. To alter this state of things a special enactment would be necessary. No authoritative enunciation of a principle would suffice. Such a law would confiscate private property, and the end would not be such as to justify the means." The Government, however, were not prepared to go so far as the Board of Revenue in declaring *gramanattam* to be the communal property of the villagers. The Government said, " By immemorial usage a portion of every village is assigned rent-free as a site for the dwellings of the villagers; but, as the old *hukum-namahs* show, the enjoyment of it is subject to regulation by the Government." This is in accordance with the common law of the land, under which the Government is only entitled to a share of the produce and therefore not entitled to levy any tax in land not capable f yielding any produce

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With reference to mirasi villages, they said, "In purely mirasi villages, where the entire area belongs to the mirasidars, the *gramanattam* no doubt appertains to them equally with the other poramboke, but these cases are exceptional." They accordingly directed the Board to issue instructions to that effect. Accordingly the Board issued Standing Order No. 39 in March 1873 (see page 58 of Maclean's Standing Orders of the Board of Revenue). It would be noticed that this was a final declaration made to the public that, so far as the zamindari and mirasi villages are concerned, the Government have no concern with them and they do not assert any ownership in them. With reference to non-mirasi villages they had only the power of control, which was no doubt necessary in the public interests. In 1875-76 when the question of the Chingleput revenue setttlement was under consideration, the Board in the Proceedings No. 1415, dated the 25th May 1875 pointed out, "the system is strongly rooted in law and immemorial custom. It is there, and must be regarded in many respects neither more nor less than a great but necessary evil. It is of great antiquity, is dearly cherished and has existed with more or less vitality, notwithstanding many years of persistent efforts to crush it.". The admission of persistent efforts during many years to crush the mirasi system and its survival notwithstanding is significant. In 1876 the settlement rules were promulgated. The Government by these settlement rules recognised, in accordance with the views above stated, the claim of the mirasidars to a *swatantram* of 2 annas in the rupee of the Government assessment, and the fee calculated at this rate was entered in the settlement register, except as regards certain lands to which it is now unnecessary to refer. The nature of the settlement, the rates conceded to the mirasidars and the title of the mirasidar as the owner of the land were clearly set forth in the descriptive memoirs that accompanied each settlement register.

The Settlement Officer states in his report that the Mirasidars agreed to abandon their obstructive tactics in the future, as they fully expected in return to receive their *swatantrams* from the Government karnam, who would collect them, and that the Government held out such hopes to them. But after the settlement was over, the Government said that, if any such expectation were held out to the mirasidars it was unauthorized. (See G. O. 2868 Revenue dated the 9th October 1909). However, the claim to *swatantram* was recognised; only the Government refused to collect the fees for paying it over to them. This recognition is continued up to date see Board's Standing Order No. 15, para. 28 at page 29, and Order 2868 Revenue dated the 19th October 1909. A few years after, however, the Government came to the conclusion that the claim of the mirasidar to the *gramanatham*

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must be resisted, and, as a first step towards it, they resolved to abolish the system of double entry, which showed the name of the occupant and also the name of the mirasidar as the owner of such land. As otherwise it would appear that the Government acquiesced in the claim of the mirasidars. The double entry was accordingly stopped some time befor 1890. In 1892 and 1894 the Government resolved definitely to deny the mirasidar's claim to the waste lands in the village, including *gramanattam*, except to the *swatantram* and to a preferential right to cultivation, and they have maintained that attitude ever since. In the meantime, the question often came before the courts. In *Sakkaji Rau* v. *Latchamana Goundan*, [1]. the plaintiff, as the sole mirasidar, sued the defendant, who was let into possession by a Revenue Officer, to recover possession of that property and arrears of *thunduthirvai* at a certain rate. The Munsif refused to eject the defendant, but passed a decree for arrears of *thunduvaram*. On appeal, the District Judge held that, by omitting to take a revenue engagement for the lands the plaintiff had relinquished his mirasi right in them, and reversed the decree in his favour for *thunduthirvai*. The High Court at first held that, while the omission of the mirasidar to cultivate might authorize the revenue authorities to introduce a cultivator, it did not further prejudice the prescriptive rights of the mirasidar, and such rights would not be lost by the mirasidar declining to receive a patta for the lands. A review of the Judgment was allowed and the case was re-argued. It may be noticed that there was no appeal before the High Court by the mirasidar against the dismissal of the claim for the recovery of the land. The question that was argued in second appeal was confined to his right to receive the dues from the cultivators who held under pattas from the Government, and the High Court held that in such cases, wherever the right was denied, there should be an enquiry whether by custom it prevailed on the estate or similar estates in the neighbourhood. It accordingly remitted issues for the trial of that question. On the point before us, as to his right to recover possession of the land, this decision is not an authority. The suggestion that the refusal of the mirasidar to cultivate the waste which was till then not paying any revenue, might justify the revenue officials in introducing a stranger, can no longer be accepted—see *Secretary of State* v. *Ashtamurthi* [2]. But the case, however, lays down the following propositions—That it is unsafe to infer that, although tenures resembling one another in their general features are met with in many provinces, these incidents are identical in different provinces or in the same province. The political circumstances have more or less affected tenures. It must not therefore be assumed that the incidents of the mirasi tenure are

1. (1880) I. L. R. 2 M. 149. 2. (1890) I. L. R. 13 M. 89 at 103.

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everywhere alike. The learned Judges expressed their dissent from the ruling of the District Court, that, if any ryot accepted a patta from the Government of land in which another person has mirasi right, the latter right is lost. It was pointed out that there had been no law depriving the mirasdars of any privileges they might have customarily enjoyed, and that the intention of the Government was to respect the privileges of landholders of all classes. This was the judgment of a Full Bench.

In O. S. No. 128 of 1882* on the Original Side, known as the Vyasarpadi case, Sir Charles Turner, who took part in Full Bench Judgment, came to the conclusion, that the plaintiff in that suit, who had purchased a piece of immemorial waste land within the limits of Madras City from the mirasidars of Vyasarpadi, was entitled to it as against the Government, who destroyed his house and garden and ejected him. There was no appeal against that decision. It is a decision directly in point. He says in that Judgment, "The first question to be considered in this suit is, whether by the customary law mirasidars have any title to the waste lands within the area of the miras estate; " and he decided that question in the affirmative. He said "From the authorities I have consulted in this and other

* IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arthur Turner Kt., C. I. E., Chief Justice.
(Original Civil Jurisdiction.)

Cosappattah Appavoo Gramany Toddy Shop Keeper residing at No. 25 in Padavattah Amman Koil Street at Cosappattah within the Local limits of Madras. — *Plaintiff*

v.

The Right Hon'ble The Secretary of State for India in Council. — *Defendant.*

Spring Branson Counsel for the Plaintiff.

The Advocate General and *Grant* for the Defendant.

The Court delivered the following

Judgment:—The plaintiff in this suit alleged to have purchased from the Mirasidars of Vyasarpadi, a piece of waste land within the limits of their mirasi estate and erected a house on a part of it and made a garden. He complains that the Government on 26th April 1881 entered on the land and destroyed the house and garden and ejected him from possession and he claimed to recover the property and compensation. For the defence it was pleaded that the suit was barred by limitation that the land was not the property of the plaintiff's vendors but of the Government and that the damages claimed were excessive.

The plea of limitation was not pressed at the hearing and I can find nothing to support it. The first question to be considered in this suit is whether by the customary law mirasidars have any title to the waste lands within the area of the mirasi estate.

* O. S. No. 128 of 1882. 24th April, 1883.

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cases which have come before the Court, I hold that mirasidars have, in this part of the Presidency, certain property in the waste, and that property enables them to dispose of the occupancy of the lands, subject of course, to the payment of revenue, and that this property is not necessarily lost by non-payment of revenue. I need not refer to any further authority than the replies made by Mr. Ellis and Mr. Sankarayya."

In O. S. No. 136 of 1889 on the file of the Chingleput District Munsif's Court, a mirasidar sued for the value of certain bamboo trees taken away by certain coolies under the orders of the Sub-Collector. The land on which the trees stood was *gramanattam* Poramboke (punjah *Mungal Vadi*). The right of the Government was negatived and the decree passed in favour of the plaintiffs was confirmed on appeal by the District Court. There was no second appeal.

In O. S. No. 33 of 1894 on the file of the District Munsif of Trivellore, the plaintiff contended that the land in question was his backyard, which he was entitled to enjoy rent-free, and that the defendant, the Collector, had no right to levy assessment on it. The defendants denied the plaintiff's claim as mirasidar. The District Munsif, after taking evidence of usage, in an exhaustive judgment upheld the mirasidar's claim, though his contention to hold it free of rent was disallowed.

The next case that may be referred to, is the one relied on by the lower courts *i.e.*, *Sivantha Naicken* v. *Nattu Ranga Chari* [1]. There the dispute was between the mirasidars and the shrotriemdars and the question was, whether as mirasidars they were entitled to the compensation for waste lands taken up by Government for public purposes, or, whether the shrotriemdars were so entitled. The Judges of the

It has always appeared to me that the mirasi tenure of Madras, Chingleput and Tanjore originally differed little from the zamindari tenure which obtains generally in Northern India. In the disturbances which preceded the introduction of British rule the rights of the mirasidars though to a certain extent recognised were not always respected, and when enquiries were made with a view of ascertaining precisely the incidents of the tenure the replies received though agreeing in many principal features differed in details. Nothing was done to secure either an accurate record of the rights of the mirasidars in each village (as was attempted if not effected in Northern India on the occasion of settlement) nor was any general rule introduced to remove the uncertainty on which the enquiries instituted by the Government had left the matter.

The introduction of a revenue system which required payment of revenue for cultivated land and enabled the person accepting an engagement to relinquish that engagement in respect of any part of the lands he had either nomeans or no inclination to cultivate added to the confusion of rights.

1. (1903) I. L. R. 26 M. 371.

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High Court held that the mirasidars were not entitled to it. It was proved in that case that the shrotriemdars had leased portions of waste lands from time to time to the mirasidars of the village and sometimes also to strangers, without giving the mirasidars a share of the rent or other compensation. There was also an admission by one of the mirasidars that they did belong to the shrotriemdars. I have already pointed out that, before the Government granted waste lands in *inam*, they often purchased the waste lands from the mirasidars. Accordingly, where it is shown that the shrotriemdar, as grantee of Government, exercised all the rights which would be exercised by the mirasidars, if they were entitled to them, the presumption would only be that the Government purchased those rights from the mirasidars and granted them to the shrotriemdar. The case, therefore, can only be taken to decide that in that particular village the so called mirasidars had not any mirasi claims. It is true that there are a few observations against the ownership of the mirasidars in that judgment, which have been relied upon by the lower courts. But it may be pointed out that, if those learned Judges meant to say that any rights which the mirasidars had were extinguished when the Government dealt with the lands, their judgment would be opposed to the Full Bench decision in *Sakkaji Rau* v. *Latchmana Goundan* [1] to which I have already made reference. When they observe that no compensation for immemorial waste was recognized by Government, they ignore the facts found in Sir C. Turner's judgment. They do not refer to the fact that the Government were ordered to pay compensation by him, and, as stated by the Advocate General in his opinion already referred to, the courts compelled the Government to pay for land taken up in 1803. When they say that the claim of the mirasidars only extends to grazing etc., they go beyond the admission

The question constantly occurring was the right of the mirasidar to waste. The better opinion appeared to be that he had a right to the waste even though he paid no revenue for it but if he omitted to cultivate what was cultivable or to provide for its cultivation by paicares the Government might issue pattahs to strangers for its cultivation. There resulted a long struggle between the mirasidars and the Government the former unable to cultivate and unwilling to pay assessment on much of the land over which they claimed rights and on the other hand resisting the introduction of strangers.

When pattahs were granted to strangers the mirasi right was not altogether ost and in some villages the mirasidars succeeded in obtaining from the ryots introduced by Government recognition of their interests in the soil by the payment of small cesses.

In the Bengal Presidency this question had received a satisfactory solution by legislation. Regulation VII of 1822, S. 8 enacted that where the waste land belonging to or adjoining any Mehal (Revenue paying estate) was very extensive so

1. (1880) I. L. R. 2 M. 149.

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of Government of the right to *swatantrâms*. They refer to the opinion of the Revenue Board as extracted in *Sakkaji Rau* v. *Latchmana Goundan* 1 as an authority. If they had referred to the original, they would have discovered that the revenue Board considered Mr. Ellis to be of the same view as themselves. It is, however, an opinion which is of not greater weight than the decisions and opinions of Government and the Court of Directors before and after. I think it is unnecessary to dwell further upon this case, as it has been considered in a more recent case by a bench, of which one of the learned Judges, Mr. Justice Benson, who decided *Sivantha Naicken Nattu* v. *Ranga Chari*2 was a member. In *Natesa Gramani* v. *Venkatarama Reddi* 3 the question arose between the Zemindar and the mirasidars. Both the Revenue Court which tried the case and the District Court in appeal found that in the Chingleput District waste lands were generally the property of the mirasidars, and that the water in such poramboke was also their property. The fact that the Government was not a party does not deprive the decision of its probative force. With regard to the case in *Sivantha Naicken* v. *Nattu Ranga Chari* 2 it was pointed out that the decision proceeded, as I have mentioned already, on the facts proved as to that particular village. The decision therefore, in *Sivantha Naicken Nattu* v. *Ranga Chari* 2 on which the lower courts relied, can no longer be treated as an authority on behalf of the Government. A decision by Benson and Bhashyam Iyengar, JJ. was relied upon. It does not refer to a mirasi village, and even in the village in question it does not show any Government ownership, nor

as to exceed the quantity required for pasture or otherwise usefully appropriated. The Revenue officers were empowered to grant leases for the same to any person who might be willing to undertake the cultivation on perpetuity or for such period as the Goverement should determine and assign to the Zamindars or other persons who might establish the right of propriety in the lands so granted an allowance equivalent to 10% on the amount payable to Government by the lessees in lieu of or bar of all claims to or in the land so granted and of such perquisites or privileges as by the custom of the country they might appear by the custom of the country entitled to receive. Such an enactment in Madras coupled with a survey and ascertainment of the limits of the mirasi estate would have put an end to much of the prevailing uncertainty as to rights and have secured at once the interest of the Government and the mirasidars.

From the authorities I have consulted in this and other cases which have come before the Court I hold that the mirasidars have in this part of the Presidency a certain property in the waste and that property enables them to dispose of the occupancy of the lands subject of course to the payment of Revenue and that this property is not necessarily lost by non-payment of revenue. I need not refer to any further authority than the replies made by Mr. Ellis and Mr. Sankariah who was for many years sheristadar in the Huzur Cutcherry of Madras.

1. (1880) I. L. R. 2 M. 149. 2. (1903) I. L. R. 26 M. 371.
3. (1907) I. L. R. 30 M. 510.

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anything more than that the Government have the right to regulate the allotment of house sites among the members of the village. The decision is not against the exclusive right of the village to waste lands against outsiders, even though claiming under Government, nor does the decision in *The Secretary of State for India* v. *M. Krishnayya* [1] refer to mirasi rights. It refers to *Kumaki* rights. There is, no boubt, an observation in that Judgment that the "right of the Government to the waste lands has now, after protracted contest, been established against mirasidars" (page 282). I am not aware of any decision to this effect other than that in *Sivantha Naicken* v. *Nattu Ranga Chari* [2] which I have referred to. It is said in the Judgment that, under the Hindu Law, the immemorial waste belongs to the crown. If this refers to the waste in the village, the ancient deeds, the fact that the Rajas had to purchase the mirasi claims before granting *inams*, the constitution of the village Government and the usage proved beyond doubt show that this opinion cannot apply to mirasi villages. It is therefore unnecessary to consider how far the general statement as to ancient Hindu Law can be supported. The question has been discussed by various authorities and by Sir Charles Turner in his minute on the land tenures of Malabar. Manu does not recognise it. He places uncultivated land in the same category as wild game as the ancient deeds to which I have referred, and his text refers to the origin of individual out of communal ownership. The only Indian writer I

Mr. Ellis was of opinion that mirasi right wherever it exists certainly extends to waste. He distinguished between cultivable waste and immemorial waste. He considered they held the former as they held the taxpaying lands of the village and might cultivate it or let it. But that in the immemorial waste though they had the right of cutting wood and quarrying (which is generally regarded as an indication of ownership) they had no right of cultivation and could not break up pasturage nor cut down productive trees such as palmyras and cocoanuts. Mr. Ellis' opinion as to immemorial waste would properly have been more accurate if he had confined it to waste adjoining mirasi lands over which the mirasidars had merely such qualified right as are not uncommonly enjoyed by the owners of village lands adjoining immemorial pasture or wood lands. Mr. Sankaria was of opinion that the mirasidars were entitled to all waste lands included in the Gramantharam or register of the lands of the village and he mentioned tha t when the Government was desirous of giving to any onein rent free tenure either a mirasi village or the waste lands or any extent of ground within the limits of the village the value of the proprietory right therein and paid to the mirasidar and that if the proprietary right was not so purchased the holder of the grant was entitled only to the Government revenue. He added that the sale could not be made without the consent of the mirasidar who was at liberty to refuse the price offered or to stipulate for a grant of other lands in exchange.

1. (1905) I. L. R. 28 M. 257. 2. (1903) I. L. R. 27 M. 871.

know of, who supports that view, is Jagannath Tarcapanchanana, who wrote in Bengal and of the state of things there. It is enough to state that, according to him, the ryot is only an annual tenant, even of lands under cultivation. Megasthenes also states that no private person is allowed to own land. On the other hand besides the reasons I have set out in my Judgment, the limitation of the King's claim to only a share of the produce of the land under cultivation, the numerous *inam* grants, the undoubted fact that the King received no revenue (as imported by the word itself) from *Agraharams*, entire villages owned by Brahmins, in which their full ownership was recognised, and was not entitled to receive anything from them according to Manu, the improbability of such claims in cases of Brahmin or military colonists have to be considered. It is, on the other hand, equally clear that, when the Hindu Law was once displaced by the Mahomedan Government, the Mahomedan chiefs, and, in imitation of them, the Hindu rulers also, deprived so far as they could the ancient proprietors of their property in land. I make these observations only to show that I should not be supposed to accept this opinion, and that, if necessary, the question requires further consideration. But, so far as miras villages are concerned, we may proceed upon facts, not theories. Munro's opinion is also relied upon. I have already discussed as to the value to be attached to it, see also Baden Powell on Village Communities, page 379. The rest of the judgment deals with Canara and proceeds partly upon the assumption of Mahomedan Law having been in force there.

From the above review, it appears to me that the following facts are clear. The opinion of Sir Thomas Munro against the right of the mirasidars and in favour of the Government claim was authoritatively

Mr. Ellis reported that mirasi right had always been and was when he wrote saleable in Madras and such a sale generally was made of certain share in the village but sales of plots were also made of plots free of the mirasi rights-Mirasi papers pp. 205, 207.

That the village Vyasarpadi was a mirasi village is shown by its inclusion in a list given by Mr. Ellis (Mirasi papers pp. 192) where it is designated Vyasarpadi and is described as held by three mirasidars. The plaintiff has proved that he has purchased from the persons who for upwards of 50 years have been regarded as the representatives of the three mirasidars. It has been proved that the plaintiffs vendors or the persons whom they represent from time to time have made sales of land to private purchasers and that they sold about 20 cawnies of of lands in the village for upwards of Rs, 15,500 to the Government for the construction of the Madras Railway and the evidence is uncontradicted that they had previously sold to Government other lands for the location of persons engaged in making tents for the Government.—The hamlet is now called Chucklerpalayam and land for the Nellore road. It was also shown that the sale deeds have not been produced to contradict the evidence that they had sold land to Government for the purposes of the Powder Factory for the esplanade and for a powder store.

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rejected when it was relied on before the civil court, and that of Mr. Ellis in favour of the mirasidars' claims accepted. Sir Thomas Munro's opinion was also not acted upon by the Court of Directors. Even in the cases of non-mirasi villages it was not accepted by them. The only right which the Court of Directors insisted upon and which the decisions recognised, was the right to protect the Government revenue and to take the lands away from the mirasidars the owners of the lands, and grant them to others, if they refused to receive pattas for cultivation. Such rights, as I have pointed out, can no longer be recognised under Act II of 1864, as explained by the decision in *Secretary of state* v. *Ashatamurthi* [1]. The Government asserted their right of ownership in 1870, but no new grounds were alleged, or, if alleged, what those grounds are, does not appear in any of the Government Proceedings. In 1872, with reference to *gramanathams*, a fuller enquiry was made and it was expressly decided that they belonged to the mirasidar. In the case of non-miras villages the right to allot sites among the villagers of the community alone was assumed. No ownership was asserted even in non-mirasi villages. In 1876, at the time of the Chingleput settlements, they conceded the claim of the Mirasidars to *swatantram*. This was done at a time when the Government had not receded from the position they had taken up in 1872, of full recognition of mirasi ownership. *Swatantram* was evidently intended as payment of owner's dues. The Government records contained the entry of mirasidar's ownership. Then they again asserted, about and after 1890, their right to the waste lands and to *gramanatham*. Besides repeating Sir Thomas Munro's statement

The plaintiff has further proved that the land in suit lies within the reputed boundaries of the village and that the mirasidars have sold soil from the land.

On the other hand the evidence for the defence amounts to no more than this that the mirasidars have not paid revenue for the land that some officers have regarded the lands as Government land and that while certificates have been issued to purchasers of plots in some cases in other cases they have been refused by the Deputy Collector of the Municipality. I find that the plaintiff has proved a sufficient title to enable him to maintain the suit. It was agreed at the trial that the possession of the Government should not be disturbed but that I should estimate the value of the lands, and buildings and garden and compensation for compulsory purchase and that if I held the plaintiff entitled to recover he should obtain a decree for the same to which I find him entitled and for the costs of suit. I found the value of the land to be Rs. 100, the value of improvements including the house............Rs. 500, and compensation for compulsory sale.................. Rs. 90, and I understood the parties accepted these figures. A decree will therefore pass for the plaintiff for Rs. 690, with interest at 6% from 20th April 1881 to the date on which possession was taken and for the costs of suit with interest on costs at the rate of 6% from the date of decree. 24th April 1888.

1. (1888) I. L. R. 13 Mad. 89.

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(without any reference to the various decisions and the opinions of the Court of Directors) we have got no new facts or arguments. The real reason for putting forward this claim appears in what was stated by the Board of Revenue in their proceedings No. 1547, dated the 7th July 1886. They state "the claim now under consideration, which is a claim that, if admitted, will enable mirasidars in all mirasi villages to do what they like with *nattam* lands and checkmate Government by refusing to the Payakaries, who have been thrust upon them by Government, houses in the village site, must be resisted as anachronistic and inconsistent with the welfare of Government and its subjects. If resisted, it will probably be asserted in a court of law, but even if it is, the Board do not think that any court will hold that the right of the mirasidars over *gramanatham* is absolute. The utmost they will get is probably a right subject to the communal right of the villagers." That these rights of the mirasidars are inconsistent with the welfare of the people generally, may probably be true. But a court of law cannot, on that account, disregard a legal claim. The first step was taken by Government by altering the 'double' entry system, which recognised mirasi ownership. But the Government conceded the mirasidar's right to *swatantrams*. It was originally claimed and allowed, as I pointed out, in recognition of ownership. If after the alteration in the Government records, the recognition was continued on any other basis, it has not been explained, and, in the absence of any explanation, it is a standing recognition of the right. While the Government have thus been vacillating in their views and putting forward their claims on different grounds, which deprive their pretentions of the weight otherwise due, the Courts have been consistently upholding the mirasidars' ownership. They have recognised their right to turn out the persons who were in possession of house sites. They have recognised their right to turn outthe persons who were in possession of lands. It is true that to many of these suits the Government were not parties. But as pointed out, it does not make them any the less binding authorities. Again. whenever the mirasidars and the Government were brought face to face in a court of law, their (the mirasidars') ownership has been recognised. No decision has been referred to in which the Government have succeeded in a court of law in asserting their claim to the ownership of these lands against the mirasidars; above all the mirasi right has survived a century of persistent effort to crush it. I am, therefore, of opinion that a mirasidar is, so far as the Government is concerned, the proprietor of the waste lands in the village. Whether he has the right to convert immemorial waste, that is *anadi karambu*, into cultivable land without the consent of Government or of the non-mirasidars of the village, is not a question that arises in this case; on that point, the authorities are all

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against the claim of the mirasidars, and, in my opinion, they are right. It is unnecessary now to give my reasons. But whatever may be the rights of the mirasidar, it is quite clear to me that the Government are not entitled to deal with the immemorial waste or introduce other Pattadars. Nor must I be assumed to decide in this case that the non-mirasi residents of a village have not the right to take up cultivable waste for cultivation on undertaking to pay the mirasidars the *thunduvarams* and other customary fees. That question does not arise for decision. The defendants in possession of the land do not set up their right as residents of the village to live on the plaint land. It may be that though the mirasidars are the owners of the village waste lands and house sites, that claim is subject to the claim of the labourers and the residents in the village, and that, if the mirasidar happens to turn out a labourer from his homestead they are bound to give him other house sites. The records seem to support this view and whether these rights have disappeared, it is not now necessary for me to determine, as the contending defendants rely solely upon the title created by Government grant. The facts found by the lower courts show that the plaintiffs have asserted their mirasi claims all through, and there is such evidence of possession as the nature of the land admits of. In the circumstances, I would allow the claim of the plaintiffs, reverse the decrees of the courts below and pass a decree for possession.

But, as my learned brother is of opinion that the mirasi rights have now been lost by proceedings of Government and decisions of courts, we refer to the Full Bench the following question :—

Whether in a mirasi village, the mirasidar is entitled to recover possession of a house site held under a patta from Government.

Sadasiva Aiyar, J.

Sadasiva Aiyar, *J.*—The plaintiffs are the appellants. They are the mirasidars of the village of Mannur in the Chingleput District, owning 2 out of 3 pangus in that village. The site in dispute is a backyard site and has been classed in the revenue accounts as the village residential *gramanatham.* It is in one account called *cherinatham,* which evidently means that it was intended to be occupied as residential quarters by pariahs. The plaintiffs' case is that as mirasidars they were absolute owners (see paragraph 5 of the plaint) of the plaint residential manai backyard, that they had been in possession of the site till October 1903, and that the defendants Nos. 1 to 7, who are pariahs, took wrongful possession of the site in October 1903. Hence the suit for ejecting the defendants and for other reliefs. The defendants' case is that the *cherinatham* in the village (of which *cherinatham* the plaint site is a portion) does not belong to the mirasidars, that it belongs to Government, that the Government was entitled to

grant the site to those applicants who wanted the site for purposes of residence, and that the defendants Nos. 1 to 12 were such grantees from Government in separate portions. The defendants also denied the plaintiffs' having had possession of the plaint site at any time. The lower courts dismissed the plaintiffs' suit with costs. The reasons for their decision might be shortly stated thus :—

(*a*) The legal presumption is that land of the kind in question belongs to Government, and any rights that the mirasidars may have are liable to be extinguished by the Government alienating the land.

(*b*) The documents A, B, C, D, E, H and J and the oral evidence on the plaintiffs' side do not establish the plaintiffs' title and do not prove that the plaintiffs exercised any acts showing their full ownership over the land. The oral evidence merely shows that some pretence of cultivation was made by the plaintiffs just about the time when the Government granted the site to the pariah defendants in 1895, within 12 years before the suit (which was instituted in 1905). The plaintiffs probably also exercised the usual privilege of the mirasidars, of removing a few branches of the trees growing upon the plaint site (Exhibit PP).

The question of possession and enjoyment is a question of fact; and I am not prepared to differ from the concurrent findings of the lower courts, that the plaintiffs had no such adverse enjoyment of full ownership right as against the Government before 1803 as would extinguish the rights of Government (if Government possessed those rights) to grant the land to the applicants on darkast. The site was a vacant waste site till January 1905. (See Exhibit IX). The documents A to E, H and J have been fully considered by the District Munsif, Mr. S. Authinarayana Aiyar. He finds Exhibit A to be probably a forgery. He finds Exhibits B and C are not proved to relate to the plaint land, and holds that Exhibits E and G came into existence after the Rev. Clayton had requested the Collector to extend the paracheri, and are therefore of little value. As regards H and J, which are dated the 6th June 1887 and 28th May 1891, and which are transactions in which mirasidars have asserted their right to the site, along with the other lands in the village, they are also of small value, though I cannot wholly reject them in the consideration of the evidence. I think, therefore, the opinion of the lower courts, that the above documents and the oral evidence do not prove the plaintiffs' title, must be accepted in second appeal. The only remaining question for consideration is, whether, as mirasidars of the plaint village in the Chingleput District, the plaintiffs had full ownership title in the plaint site and, in consequence of such full title, the Government owned no such right in the site as could

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enable the Government to grant the same on darkast to others. Full and lengthy arguments have been addressed to us on the question of the nature and extent of mirasi rights. Most of the public records and the earlier judicial pronouncements on the question of mirasi rights are found entered in Huddlestone's Mirasi Rights. I think, however, that reference to these old documents can only be a matter of academic interest at present. There has not been much continuity of policy or consistency in the declarations of policy by the Government till about 1875. But, from about 40 years ago, the Government have consistently been claiming that they have got a paramount right over *cherinatham* sites and other communal lands even in mirasi villages and that they were entitled to grant them to applicants, so as to extinguish the rights and privileges (if any) of mirasidars in any such site. Mirasi right seems to have prevailed formerly in the Chingleput, Arcot, Tanjore, Trichinopoly and Tinnevelly Districts. So far as the Tanjore, Trichinopoly and Tinnevelly Districts are concerned, the Government ceased to call most of the ryotwari holders of land in those Districts as mirasidars several years ago, and they are now called merely ryots. Most of the bigger ryots, who call themselves still in documents as mirasidars, especially in *panguvali* villages, have long ceased to claim any rights in immemorial wastes and communal lands, and the Government has been, it is well known, exercising full rights as owners in respect of such lands without serious objection for several years past. It is only in the Chingleput District that the question is being raised from time to time, even in comparatively recent dates. I think we are bound by the later pronouncements of this High Court as regards the nature of mirasi rights in the Chingleput District, and I, therefore, do not propose to consider the cases which had been decided before the Full Bench decision reported in *Sakkaji Rau* v. *Latchmana Goundan* [1]. The Judgment in that case goes pretty fully into the history of the question of mirasi rights. The appeal in that case was twice heard (the second time on review). It is clear from that decision that the extent of the mirasi right in one village was not the same as that of the mirasi right in another village even in the same district. The opinion of Sir Thomas Munro is entitled to very great weight in connection with land tenures. In his minute of the 31st December 1824, Sir Thomas Munro expressed his belief that, by the usage of the country, the Government possessed the absolute right of disposing of the waste as it pleased in villages which were mirasi as well as in those which were not. On the 24th July 1839, Mr. Freese the Collector of Chingleput, asked for an expression of the views of the Board as to the rights of the mirasidars and especially, whether they had the right to sell poramboke and immemorial waste, and thought that, "as regards poramboke and immemorial waste, their

rights extended no further than to the privilege of grazing their cattle on them when waste and receiving the 'coopatums' when cultivated." The Board replied to Mr. Freese that "the mirasidars could not sell immemorial waste, but that their rights were confined to grazing and cutting firewood and similar common privileges, but that *these must give way to any proposition ensuring the extension and realisation of the public revenue.*" In 1841, the Provincial Court ruled that "the mirasidar was entitled to engage for the cultivation of waste in preference to a stranger." In 1875, the Government passed proceedings that if an immemorial waste is given to other than mirasidars, the grantee should pay the usual *swatantram* to the mirasidars and the mirasidars had no other rights. By the decision in the above case in *Sakkaji Rau v. Latchmana Goundan* [1] it was held that, as regards even the rights to the *swatantrams*, when strangers are introduced by Government as cultivators of waste lands, the mirasidars should in each case prove the existence of such rights and there could be no presumption that they are entitled to such *swatantrams*. As I understand the Full Bench Judgment in *Sakkaji Rau Latchmana Goundan* [1] it established the rights of Government to let immemorial waste lands over the heads of mirasidars to others, reserving only the right in the mirasidars to get *swatantrams* from persons let in by Government, provided the mirasidars could establish by evidence the existence of a custom to get *swatantrams*, the decision reserving also the privilege of the mirasidars to cut branches from trees on immemorial waste lands etc., and to cut firewood etc., so long as the lands remained such waste. I need hardly say that, as regards *communal* poramboke lands, the rights of Government cannot be less extensive than their rights in immemorial wastes. I shall now at once come down to the case in *Sivanatha Naicken* v. *Nattu Ranga Chari*, 2, merely remarking by the way that no case decided by this High Court has been quoted before us between the case in *Sakkaji Rau* v. *Latchamana Goundan* 1, *Sivanatha Naicken* v. *Nattu Ranga Chari* [2], which is in conflict with the decision in *Sakkaji Rau* v. *Lachmana Goundan* [1]. One case decided by the Trivellore District Munsif has been quoted to us. The learned District Munsif who decided that case, was the late *lamented Mr. V. Swaminatha Aiyar* [3]. His Judgment, I need not say, is a very able and learned one. In that case, however, it was found as a fact that the *natham* sites then in dispute had been in the actual occupation of the mirasidar and his ancestors for more than 60 years before suit. See page 25 of the printed papers, lines 3 to 6. With respect to the Judgment, Exhibit N, therefore, I need only say that, the Full Bench decision in *Sakkaji Rau* v. *Latchmana Goundan* [1], must be followed

1. (1880) I. L. R. 2 M. 149. 2. (1903) I. L. R. 26 M. 371.

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by us in perference to Exhibit N. even if the observations in Exhibit N were not *obiter*. Coming then to *Sivanatha Naicken* v. *Nattu Ranga Chari* [1], that case was decided by Mr. Justice Davies and Mr. Justice Benson, two very learned Judges who had much revenue experience in the early days of their service. The learned Judges say in that case that the rights of mirasidars to immemorial waste, apart from their preferential right to cultivate appear to be confined to grazing, cutting firewood and similar common privileges, as stated by the Board of Revenue in the passage in this Court's Judgment in *Sakkaji Rau* v. *Latchmana Goundan* [2], but *those rights were liable to be extinguished by the Government alienating the land.* This decision is an authority directly in point. In *The Secretary of State for India* v. *M. Krishnayya* [3], it was held that even in South Canara, as regards which district Sir Thomas Munro used the expression that "all land is private land," the general presumption is that forest and immemorial waste land is the property of the Government. The three learned Judges forming the Full Bench, namely the learned Chief Justice, Davies, J., and Benson J., quote with approval the minute of Sir Thomas Munro of the 31st December 1824, penned by him as Governor of Madras and already referred to by me. The learned Judges say that when Sir Thomas Munro's experience reached its ripest maturity, he held that the waste lands in mirasi villages in Arcot did not belong to the mirasidars as Mr. Ellis thought, and that the Circar, from ancient times, has everywhere even in Arcot as well as other provinces granted waste in *inam* free of every rent or claim, public or private, and it appeared in all such grants to have considered the waste as being exclusively its own property. And his opinion is again quoted that "In all villages, whether miras or not, the inhabitants reserve to themselves the exclusive use of the waste. *But this right is good only against strangers, not against the Cirkar (Sirkar) which possessed I think, by the usage of the country, the absolute right of disposing of the waste as it pleases in villages which are Miras as well as in those which are not.*" The State might grant those waste lands on such terms as it deemed fit and found practicable." I think this Full Bench Case in *The Secretary of State for, India* v. *Krishnayya* [3] also establishes the Government's paramount right over waste and communal land so as to extinguish all rights and privileges (if any) of the mirasidars in such lands. See also *Subbaraya* v. *Krishnappa*, [4] decided by Collins, C. J., and Parker, J., in which it was held that the principle to start from is, that "waste lands belong to the State." I am, therefore, of opinion that it is now too

1. I L. R, 26 M. 371.
2. (1880) I.L.R. 2 M. 149.
3. (1905) I. L. R 28 M. 257.
4. (1889) I L.R 12 M. 422

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late to set up in any village in the Madras Province that the Government has no right to grant residential sites called *gramkantham* or *gramanatham* or *cherinatham* to applicants, so as to extinguish the rights (if any) of persons calling themselves mirasidars. It has been held in several cases that the word "ownership," when applied to land, is a term of very loose signification in India. The Government is styled by some authorities as the only owner of all lands in India. Other authorities say that Government is entitled only to impose a land tax and that the ownership in cultivated lands vests in private persons. Some writers treat Zemindars as owners of the Zemindari lands, while others consider Zemindars as merely farmers of revenue entitled to get the customary rent, the cultivators of the soil being the real owners of the land and not merely lessees under the Zemindar owners. All these fights are mostly disputes about words. The substance of the question in the present suit is whether the Government has the right to grant communal residential sites in mirasi villages to applicants for such sites, so as to extinguish the privileges of mirasidars, and, whether you call this right as flowing from its *ownership* of the sites or from *its paramount sovereign right* to make such grants, is not, in my opinion, of any practical importance.

I think that this question ought to be decided in favour of Government on the principle of *stare decicis*. There can be no doubt that in 1872, the then Government (the *personnel* of the Government usually changing every five years) thought that mirasidars in purely mirasi villages were the owners of even the *nattam* Poramboke lands in the villages. In the Government Order No. 1684 of that year, the Government say "In purely mirasi villages, where the entire area belongs to the mirasidars, the *gramanatham*, no doubt, appertains to them equally with the other Poramboke, but these cases are exceptional." But in 1886, the Government found that they had ignored their own prerogative too much, and, when the Revenue Board pointed it out, the Government approved of the Board's opinion, After the date of this Government Order of July 1886, there were the Board's Proceedings of September 1887 and they include a very frank letter of Mr. Johnson. Mr. Johnson says:—"The mirasi bugbear is destined gradually to die a natural death if left to the ordinary operations of time." Between 1872 and 1886 we had the case in *Sakkaji Row v. Latchmana Goundan* [1] (it must have been decided about 1880) which recognised the Government's paramount prerogative. As I said already, the mirasi bugbear seems to have died a natural death (using the words of Mr Johnson) in all the other Districts except Chingleput. In Chingleput, the *preferential* right of the mirasidar as a legal right to get darkhast grant from the Government for immemorial

1. (1880) I. L. R. 2 M. 149

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waste and his right to *swatantrams* (calculated as a fraction of the assessment) when such immemorial waste was allotted to any other person than the mirasidar, these two rights seem to have been recognised till recently and hence the efforts of the mirasidars to claim full ownership rights have not ceased even after *Sivanatha Naicken* v. *Nathu Ranga Chari* [1], As said in the letter of the Special Settlement officer, Mr. G. A. D. Stuart. "the posssession of special privileges by particular classes is an anachronism at the present day and the mirasi system is destined to go the way of all anachronisms. Even in the thirty years since the last settlement, mirasi right seems to have died out altogether in many villages. It is still fairly vigorous, however, in many places, but patience and time are all that are necessary to see the end of it."

In 1890, the Government passed Revenue Proceedings No. 704, dated the 3rd September. In paragraph 5 of that letter they say, "It is true that in 1872, the Government declared that in the exceptional case of purely mirasi villages, where the entire area belonged to the mirasidars, the village site would also appertain to the same body, but the opinion exressed was stronger in appearance than in reality, for it formed part of an argument contesting the view of the Board that village site was the communal property of the villagers and did not appertain to Government. *In any case, His Excellency the Governor in Council is not now prepared to subscribe to the above dictum*, and it is observed that when, in 1816, the Board challenged the correctness of the order of 1872, the Government allowed the challenge to pass unnoticed. The said order has thus practically become a dead letter in so far as it acknowledges the claims of mirasidars to village sites, and, in the revised edition of the Standing Orders the words 'mirasi villages' have been omitted from Standing Order No. 37 (formerly No. 39)." I think that, except in the matter of preferential claims to grants on darkhast of immemorial waste and except as regards the right to claim *swatantrams* and the right to gather leaves and firewood from trees growing on waste and Poramboke lands not yet granted by Government, it is inexpedient to revive these mirasi claims, which were in various stages of disintegration before 1890, and which were never recognised by Government after 1890. I should like to hold that such claims must be taken to have been finally killed by the case in. *Sivantha Naicken* v. *Nattu Ranga Chari* [1]. It is better to treat the present litigation as "the last flickering up of a dying fire" and as the final ineffective "expiring gasp of protest" of the mirasi right fighting in its last ditch. Preferential claims, however, of mirasidars to occupy waste lands in their villages for cultivation and, in Chingleput, to levy a fee from

1. (1903) I. L. R. 26 M. 371.

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non-mirasidars who may take up land for cultivation have been recognised by Government even in September 1892. See proceedings No. 1010 A, Government of Madras, para. 4.) Those two rights and the other rights mentioned in *Sivanatha Naicken* v. *Nattu Ranga Chari*[1] may be still considered to be alive and all the other rights as dead. It is true that till 1886, the opinion of Mr. Ellis about mirasi rights was treated as more in accordance with the customary law than the opinion of Sir Thomas Munro. It is also true that the High Court of Madras was considered by the Government to have so far committed themselves to opinions in favour of the mirasidars that it was safer not to contest the matter by a frontal attack in the High Court itself, but to have it fought out in the District Courts. As I have already said, however, the case of *Sakkaji Rau* v. *Latchmana Goundan* [2], which was decided about 1880 by the Madras High Court, did not unconditionally recognise the mirasidar's right, but held that the mirasidar should prove even the customary right to *swatantrams* where it is denied. There can be no doubt that, till 1886, the inclination of the High Court was to hold that mirasidars had ownership rights in immemorial wastes and in *nattam* sites also. But the Revenue Board and the Government, from 1886, were determined, by all legitimate means, to establish the paramount rights of Government to grant *nattam* poramboke sites, and also to deny all other rights claimed by the mirasidars, except the right of preference when grants to immemorial wastes are made and to obtain *swatantrams* if grants are made to others than mirasidars, and similar rights. It must be admitted that this resolve of the Board of Revenue and of the Government *so far as nattam sites are concerned* was arrived at, not for the purpose of obtaining more revenue or other pecuniary benefit, but in the interests of the public, especially of the depressed classes. As my learned brother has put it in his judgment, "That these rights of the mirasidars are inconsistent with the welfare of the people may probably be true." Subsequent to 1886, we have got at least two judgments of this High Court, one being the case in *Sivanatha Naicken* v. *Nattu Ranga Chari* [1], and the other, in *The Secretary of State for India* v. *M Krishnayya*, [3], which two decisions, it seems to me, clearly follow the opinion of Sir Thomas Munro in preference to the opinion of Mr. Ellis. The observation in *The Secretary of State for India* v. *M. Krishnayya* [3], (which is a Full Bench case decided by the Chief Justice and Justices Davies and Benson) is that "the right of the Government to waste land has now, after protracted contest, been established against the mirasidars." This seems to indicate that the decisions till 1886, which favoured the mirasidars, were given during the first stages of the

1. (1903) I. L. R. 26 M. 371. 2. (1880) I. L. R. 2 M. 149.
3. (1904) I. L. R. 28 M. 257=15 M. L. J. 147.

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contest, and that the final battles had gone in favour of the Government. As remarked by my learned brother in his Judgment, it may be that this observation rests upon the results of a comparatively fewer number of cases decided by the High Court after 1886 than the number of cases decided before 1886 which held the other view. In the case in *Natesa Gramani* v. *Venkatarama Reddi* [1], the contest was between the Zemindar and the mirasidars and the paramount right of the Government as ruling authority was not in contest. As between the Zemindar and the mirasidars, the evidence in that particular case seems to have (in the opinion of several lower Courts) established the rights of the mirasidars in poramboke lands and the High Court was "not prepared to interfere with the finding of fact at which all the lower Courts have arrived at." The judgment in *Natesa Gramani* v. *Venkatarama Reddi* [1], (to which Benson, J. was a party) does not dissent from the observations in *Sivanatha Naicken* v. *Nattu Ranga Chari* [2], and *The Secretary of State for India* v. *Krishnayya* [3], (to which decisions also, Benson, J., was a party) but, *so far as the relative rights of the Zemindar and mirasidars were concerned*, *Sivanatha Naicken* v. *Nattu Rangachari* [1], decided in one way on the evidence in that case, and *Natesa Gramani* v. *Venkataramana Reddi* [1], decided the other way. I find myself unable to hold that *Natesa Gramani* v. *Venkatarama Reddi*,[1] has, in any way, weakened the authority of *Sivanatha Naicken* v. *Nattu Ranga Chari* [2], or the Full Bench decision in *The Secretary of State for India* v. *M. Krishnayya* [3]. Under these circumstances, I do not see my way to hold that the mirasidars have got higher rights than are recognised in *Sivanatha Naicken* v. *Nattu Ranga Chari*,[3] and *The Secretary of State for India* v. *Krishnayya* [2] without practically over-ruling those decisions. My learned brother's inclination being against the opinion expressed in those two decisions, and as the question is a very important one, I concur with him in referring the question of the extent of mirasidar's rights to *nattam* Poramboke sites to a Full Bench.

[The Second Appeal came on for hearing as per above order on Monday, Tuesday, Wednesday, Thursday, Friday and Monday, the 16th, 17th, 18th, 19th, 20th and 23rd days of August 1915].

S. Srinivasa Aiyangar (*with him A. Swaminatha Aiyar*) for the appellants :—The argument will be confined to the Mirasi villages in the Chingleput District, as the materials available relate directly and continuously only to that District.

A Mirasi village was originally a village community. It had peculiar features in the tract of country called "Tondaimandalam", the

1. (1907) I. L. R., 30 Mad. 510. 2. (1903) I. L. R. 26 Mad. 371.
3, (1905) I. L. R. 28 Mad. 257.

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country between the two *Pennars*. This tract corresponds to the present districts of Chingleput, North Arcot and South Arcot. At the time of the British advent, the mirasi village existed in full vigour in the Chingleput district, whatever its fate might have been in the two Arcots. There were two descriptions of the Mirasi villages:—1. Pasankarai or Samudayam, which was the perfect village community, and 2. *Arudikarai*.

The *Pasankarai* type itself consisted of two classes, one in which all the lands of the village were enjoyed in common and the profits alone were divided; the other, in which there were temporary allotments of the lands themselves and a subsequent re-distribution thereof. This latter class was known as "*Karaiedu*".

In the Arudikarai type, all the cultivable lands of the village were finally and completely divided, and the uncultivable lands were treated as Samudayam or common property. The samudayam included waste and poramboke. The share of an individual mirasidar in such Samudayam lands was sold along with his share in the cultivable lands.

There were other incidents peculiar to the mirasi tenure. One was that in cases in which the mirasidar could not himself cultivate the lands, he had the right of introducing other cultivators into the lands. They were of two classes: one Payakaris or Purakudis, and the other Ulkudis. The tenure of the former was of the most precarious description. They could not alienate the lands themselves and were liable to be turned out at the pleasure of the mirasidar. The Ulkudis, on the other hand, were tenants of the village itself. Their tenure was more lasting, and although originally the Ulkudis had occupancy right in the lands into which they were introduced, they sometimes acquired it after some generations of enjoyment. But even they could not sell their holdings, in that respect differing from occupancy ryots of other villages.

Another incident of the tenure was the right to *Tunduwaram*. The mirasidar was entitled to this payment from a tenant introduced by Government into lands included in Mirasidar's patta but left uncultivated by him.

The mirasidar had also a preferential right to enter into an engagement with Government in respect of waste lands desired by Government to be cultivated; and if such lands were given by Government to third parties for cultivation without the consent of the mirasidar, the latter had the right of turning him out.

The last two incidents were recognised by the Court of Directors in recognition of the mirasidar's right to waste lands and were not a concession to the mirasidar.

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[*Ayling, J*:—Were the Mirasidar's rights in Poramboke identical with his rights in waste lands ?]

Poramboke is merely unassessed waste; while waste lands are assessed waste. The mirasidar's right in Poramboke was higher because he held it free of assessment. Description of "Poramboke" in Glossary to Fifth Report and Wilson's Glossary at page 428 referred to. For all legal purposes, Poramboke is merely the unassessable area of the village. Waste is of two kinds:—1. *Seigal karambu, i.e.*, occupied but assessed waste; 2. *Annadi karambu* or immemorial waste, *i. e.*, unoccupied and unassessed waste, *i. e.*, Poramboke.

The right of mirasidars to Annadi karambu was never questioned, though doubts had been raised now and then as to the exact nature and extent thereof. The right was to occupy such land and to occupy it free of rent.

The only limitation to which the mirasidar's ownership of Poramboke was subject was that if he cultivated it he had to pay assessment. He could use it in a manner consistent with the nature of the property. That is, he could use a tank as a tank and a house site as a house site. He could also prevent strangers from using the poramboke.

[*Chief Justice*:—Do you mean to say that if to-day the Collector of Chingleput grants Poramboke land in a mirasi village on dharkast a *purakudi*, the mirasidar can turn him out?] Yes.

[*Chief Justice*:—Do you say the British Government recognised the unlimited right of the mirasidar to Poramboke in a mirasi village ?]

Yes; and we also argue that, having once recognised such ownership, it was not afterwards open to Government to whittle away that right by subsequent Government Orders. In respect of Poramboke, the Mirasidar has the same rights against Government that he had against the East India Company. The question is not whether Government now recognises that right, but whether it ever recognised it.

[*Kumarasami Sastri, J*:—Is not all that you say consistent with the Government's ownership even of the Poramboke. It might well have been that, consistently with its ownership, Government allowed mirasidars to enjoy the Poramboke as they pleased and reserved to itself the power to take away the land and dispose of it as it thought fit if not satisfied with the mode of its enjoyment?]

No; the Government of India has a prerogative right only to the revenue of the land.

[*Chief Justice*:—Where do you get all this from ?]

The theory is that Chingleput District was formerly a big jungle and was granted to a body of colonisers called mirasidars who came and settled in the village.

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The claim of the mirasidars may be rested on :—1. a grant by the then sovereigns, 2. the tenure being a customary tenure with certain incidents, or, 3. solemn declarations of the Government recognising the right of the mirasidars.

[*Kumarasami Sastri, J* :—Even now, under the dharkast rules, a mirasidar has a preferential right to get poramboke for cultivation ?]

Yes. In Zamindari, Mirasi and Inam villages Government has not got the prerogative right of redistributing poramboke.

Papers relating to the Mirasi tenure:—Place's Final Report on this Jagir. Huddleston's Mirasi Papers, pp. 38, 39, 40, 41, 43.

Place attaches importance to the fact that the village itself was divided into shares as showing that mirasidars were themselves owners of the village and were not mere tenants. The distinction drawn by him between mirasidar and payakari is also important in the same way. In Place's opinion the mirasidar was not a mere occupancy ryot, but a grantee of the village itself on full assessment.

[*Kumarasami Sastri, J*:—If mirasidars were grantees of the village, how did Government get the right of introducing a *parakudi* into the village ?]

By virtue of its prerogative right to the revenue. That right is not inconsistent with the right of the mirasidar because the latter may turn out the parakudi introduced by Government and cultivate the land himself and pay the revenue payable for it.

[*Kumarasami Sastri, J* :—A mirasidar has merely a pre-emptive right ?]

The question is really whether the mirasidar is owner himself or has only some special rights without being himself owner. Huddleston, page 53.

[*Kumarasami Sastri, J* :—According to Place's theory, the Sovereign cannot grant any land in Tondaimandalam to anybody because the whole of it had been granted away by him.]

He cannot, unless the land has come back to him by relinquishment, surrender, etc., or, unless the village in question is not a mirasi village. Huddleston, pp. 67, 68.

The mirasi village existed in full vigour even after the advent of the British Government and was recognised by it. In the *Fifth Report* at page 41, Place's view is accepted. Fifth Report, pp. 41 to 44. Mirasidar's ownership of the land itself is also evidenced by the fact that payakaris let into possession by Government had, besides paying revenue to Government, to pay a certain sum to the mirasidar in recognition of his privilege. *Crole's Manual of Chingleput* supports Place's view, page 204. A distinction is drawn between Tondaimandalam and other parts of India, pp. 205, 207. In the mirasi villages there are

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maniams given to each mirasidar, irrespective of his being a karnam or other office-holder, for the purpose of managing the village communities. This maniam he holds free of revenue, page 208—view of Ellis's set out, pp. 209, 211, 213, 220, 221 and 222—The colonisation is a historical fact in the opinion of Crole. The Government issued questions to the various Collectors at the time of the Settlement of the ryotwari tracts regarding the mirasi tenure. Huddleston, page 172—Ellis's report (1816) page 174—states what Government thought of that report (1817). Ellis draws a distinction between mirasi in land and mirasi in village office. Page 185—right of mirasidar to waste lands of village is referred to and its extent stated. Page 218—Sankarayya's Answers—the only difference between his views and those of Ellis are with regard to forfeiture for non-cultivation. Page 220—Mirasidar's right to waste referred to—Sankarayya refers to the practice of Government purchasing waste lands from mirasidars for the purpose of granting them to strangers and his statement is corroborated by the Inam Commissioner. Appended to the answers of Ellis are deeds whereby mirasidars of this tract of country disposed of gramanatham for value, pp. 293, 294, 304, 321, 325, 327, 368, 372 and 373.

[*Chief Justice* :—If the mirasidars were originally owners of all the lands of the village, they would be entitled to do with them what they pleased. Where then did the restriction with regard to using particular ways come from? Why should not the mirasidar build on cultivable land?]

The restriction comes from the nature of the property in question. The fact that a person is the owner of a particular property does not entitle him to use it in any way he pleases. Even now, owners of houses in Madras, for instance, cannot make any use of them they please. They are subject to municipal and other laws. The restriction therefore is not inconsistent with the ownership of the mirasidars.

[*Kumarasami Sastri, J* :—Why should not a mirasidar cultivate poramboke used as a tank without the consent of the Government?]

The reason is this: Tanks etc. are required for the upkeep of the villagers. It is therefore necessary that tanks etc. should be preserved as tanks etc. Further Government must also get its revenue and should see that lands which can be cultivated are cultivated. The mirasidar's right to tunduwaram, *kuppatam* and the right to cultivate in preference are surviving indicia of his ownership. The right to tunduwaram cannot be reconciled with a mere preferential right. The mirasidar's ownership is also clear from the fact that a parakudi let into land of a mirasi village by Government does not thereby become a mirasidar

himself. See Mirasi papers, pp. 377, 378, 407, 418. For final proceedings of the Board of Revenue—See Mirasi papers, p. 424. Sir Thomas Munro's Minute of December 1824 at p. 430. Till Sir Thomas Munro's Minute the rights of the mirasidars were recognised after due investigation by competent officials. Smalley made certain proposals of which nothing came. Then when Sir Thomas Munro wanted to introduce the ryotwari system, the whole tenure (mirasi) was again gone into and in that connection Sir Thomas Munro expressed an opinion adverse to the mirasidars. So far as the Chingleput District is concerned, Sir Thomas Munro's opinion is useless.

We concede that, speaking generally, waste lands may be said to belong to the Crown. Our submission is that in cases, in which it is shown that waste lands belong to others, they ought not to be held to belong to the Crown. Thus in zamindaris they belong to the Zamindars; in Inam villages they belong to the Inamdar. My contention is that in mirasi villages they belong to the mirasidars. Mirasi Papers, pp. 437 para. 8; 438, 443.

Sir Thomas Munro rests his views on tank theory for which there is no warrant. But even he recognises the existence of the mirasi tenure. He admits the enjoyment by mirasidars of whole villages in common and the preferential right of mirasidars to cultivate waste lands. Baden Powell's Indian Village Communities (1896) pp. 362 to 379.

[*Kumarasami Sastri, J*:—If Government did as a matter of fact grant inams of waste lands, does not that fact cut at the root of the mirasidar's rights, unless, of course, the theory of a purchase by Government of the same from mirasidars is accepted?]

The theory is that the Government did as a matter of fact purchase from mirasidars. Such purchase is spoken to by Sankariah, the Inam Commissioner and Smalley. Mirasi Papers, pp. 449, 451, 455. The paper on page 455 is most important. The general policy of the Government is there stated. See also pp. 456, 459, 464, 468. The Judgment printed in these pages shows that the waste lands belonged to the mirasidars quite as much as their warapat lands, and that the waste lands were held not in severalty but in common.

[*Chief Justice*:—Was this case ever carried to the Sudder, Adawlut?]

No; at page 466 is the Appellate Judgment. It accepts Ellis's view, ignores that of Sir Thomas Munro and negatives the right of Government to waste lands altogether.

At page 478 is the despatch of the Court of Directors dated 3rd July 1844 approving of the judgment above referred to.

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At page 486 is a judgment of the Sudder Adawlat with reference to the mirasidar's rights to house sites in Kumbakonum.

See also the Decision of the Madras Sudder Court dated 1850 (No. 14 of 1849) printed at page 15 of the Madras Sudder Court Select decisions. It held that Government had no authority unreservedly to dispose of waste lands in a mirasi village and that they were at the disposal of the mirasidars. 1854, Sudder Decisions, page 140. 1862, Decisions of the Sudder Court, page 50 (Chingleput case).

We rely upon the last Judgment for showing that it was then a matter of great notoriety that the mirasidars were owners of all the samudayam lands of a mirasi village. The fact that Government was not a party to the suit does not detract from the value of the judgment for this purpose. Mirasi Papers, pp. 534 (para. 2), 536, 538, 545, 549, 553, 555, 558. In 1872 there is a Government Order * upon the question of the assignment of village sites which is most important. C. S. No. 128 is a decision of Sir Charles Turner holding that a mirasidar is bound to pay assessment for nattam land brought under cultivation by him but that Government is not entitled to turn him out and introduce a stranger. The practice of making a double entry, *i. e.*, of entering the gramanatham in the name of the mirasidar in the village accounts whoever may be the occupant is decisive of the question.

[*Chief Justice.*—What you say is that in the village accounts nattam was entered in the name of the mirasidar if he was himself the occupier and if there was any other occupier, he was shown as occupier and the mirasidar was entered as owner.]

The Government Order No. 704 of 3rd September 1890 is quite decisive and subsequent proceedings could not affect the mirasidar's rights.

Cases relating to poramboke.—*Sivanatha Naicken* v. *Nattu Rangachari* [1] proceeded on the special evidence in the case and not on any general principle opposed to the rights of mirasidars. *Natesa Gramani* v. *Venkatarama Reddi* [2] explains *Sivanatha Naicken* v. *Nathu Rangachari*1 and lays down general principles in favour of mirasidar's rights. *The Secretary of State for India* v. *Krishnayya* [3] relates to South Canara and is of no use so far the mirasi question is concerned. *Secretary of State* v. *Asthamurthi* [4]—We rely upon the observation at page 120 to the effect that the rights of the mirasidar are no less than those of the Jenmi. The case is also authority for the position that after Madras Act II of 1864 the right of Government on default of cultivation is only

1. (1903) I. L. R. 26 M. 371, 2. (1907) I. L. R. 30 M. 510.
3. (1905) I. L. R. 28 M. 237, 257. 4. (1888) I. L. R. 13 M. 89 (117).

* See Appendix A to the Judgment.

† See Appendix B.

to sell the holding and not to take away the land itself from the defaulter. Prior to this decision there was a conflict and this decision set that conflict at rest.

[*Ayling, J.* referred to *Subbaraya Mudali* v. *The Sub-Collector of Chingleput* [1] as being against the contention of the appellant.]

The observation on that passage is no doubt against us. But that is no longer law—See *The Secretary of State* v. *Ashtamurthi* [2].

[*Ayling, J*:—I do not see how Madras Act. II of 1864 has taken away the right of Government to take land of a defaulter.]

Waste land in a mirasi village cannot be taken away from a mirasidar and granted on patta to a stranger. The mirasidar can sue for cancellation of patta and for recovery of the land. The mirasi grant, I concede, does not enure to the benefit of the mirasidar in two cases (1) revenue sale, and (2) relinquishment by mirasidar.

The Collector of Trichinopoly v. *Lekkamani and others* [3] referred for the position that fixity of assessment has nothing to do with property in land and that the question is of the exercise of rights by mirasidars and other persons concerned.

Madras Regulation XXV of 1802. Preamble shows that mirasidars are not to be treated as ordinary cultivators and ryots.

Madras Kurnam Regulation XXIX of 1802.—S. 11 referred to as explaining double entry of keeping accounts.

The Acting Government Pleader (N. Grant) for Respondent, Government:—Appellant rested his case on one of three grounds:—

1. Original grant,
2. Custom,
3. Admissions by Government of the mirasi right.

Evidence showing the attitude of Government towards the mirasi right after it took Chingleput: Fifth Report (1812) page 10—The right of the mirasidar was only a preferential right to cultivate subject to the superior landlordship of Government.

[*Kumarasami Sastri, J*: That means the prerogative of the Crown to revenue.]

[*Chief Justice*: Your starting point is that no cultivator in India had any right to the soil. He was only a tenant of Government.]

[*Ayling, J*: You say that was the view taken by Government.]

Yes.

[*Kumarasami Sastri, J*: You rely on the passage as being a confiscation of all private rights in property.]

The Government said rightly or wrongly that was all the right possessed by the Mirasidars.

1. (1883) I. L. R. 6 M. 303 at 307. 2. (1888) I. L. R. 13 M. 89 at 120.
3. (1876) L. R. 1 I. A. 282.

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[*Chief Justice*:—If you rely upon this passage as a sort of governing document you must produce the Government Order.]

See also Huddleston, Mirasi papers, pp. 25-66, para. 15.

Having established that in 1796 Government was of opinion that property in the soil vested in itself, I proceed to the references showing what the right of the Government is now.

Land Encroachment Act (III of 1905) does not refer to the rights of the mirasidar at all.

Huddleston, page 148, para. 13. The compensation which is there stated to have been paid is in respect of land in the possession of the mirasidar but left uncultivated by him. I concede the right of the mirasidar to his warapat land.

Sir Charles Turner's decision in the *Vyasarpadi case* [1] is no doubt against me. Evidently the remarks of Sankariah at page 216 were not brought to the notice of the learned Judge. Huddleston, page 326: The deeds of conveyance relied upon by the other side prove too much, because they are so drafted as to indicate that the mirasidars were the absolute owners.

[*Kumarasami Sastri, J*:—All that they show is that they asserted rights now questioned.]

Huddleston, page 344, para. 39: The reply of the Court of Directors to this paper is at page 428.

.... pp. 345 (1817); 346 (bottom). The mirasi right was not recognised by any of my predecessors.

[*Kumarasami Sastri, J*:—All that is stated is that the mirasi system did not exist in the South Arcot District.]

The other side said that Tondaimandalam included the present South Arcot and Chingleput Districts and yet as early as 1817 it was stated that the system did not exist in the South Arcot District at all. The other side has to account for this difference.

[*Chief Justice*:—Sir Thomas Munro seems to have remarked that in his time the mirasi system was in a state of disintegration. It might have disintegrated in the South Arcot and it might not have disintegrated in Chingleput.]

[*S. Srinivasa Aiyangar*:—It was open to the British Government to recognise or not to recognise the system. It did not do so in South Arcot but did so in Chingleput.]

Huddleston, p. 349:—Reply of Ellis. The view expressed here as to the right to Government to take land of a defaulter and grant it to a stranger is opposed to the decision of Sir Charles Turner in *Subbaroya Mudali* v. *The Sub-Collector of Chingleput* [2].

[*Kumarasami Sastri, J*:—That decision is only with reference to land abandoned by mirasidar.]

1. See supra, page 18. 2. (1883) I. L. R. 6 M. 303 at 307.

No; Huddleston, pages 357 para. 17, 363, para. 8, 364, 365, 368, 382, 397 (Smalley's Report, 402, 403. Although Smalley speaks of the right of the mirasidar, he himself says he is not the owner.

[*Ayling, J* :—He admits the mirasidar's right to recover. He is simply making proposals and although it may be said that he would not have made such proposals if he had thought that the mirasidars had no right at all, they are nothing more than proposals.]

The whole mistake is due to the fact that these proposals are regarded as enunciations of law.

[*Kumarasami Sastri, J* :—Sir Thomas Munro seems so to regard them in his minute.]

I admit the preferential right of the mirasidar to cultivate waste land.

[*Kumarasami Sastri, J* :—Do you admit, that, if the Government without giving notice to the mirasidar grants a patta to a stranger for waste land, the mirasidar can eject the stranger from the land ?]

It may be a hardship to the mirasidar but the Madras High Court has held in *Subbaraya Mudali* v. *The Sub-Collector of Chingleput* [1], that he has no remedy.

[*Kumarasami Sastri, J* :—Then the preferential right conceded by you is merely illusory. Surely the mirasidar cannot be in a worse position than a man with a right of pre-emption.]

I rely upon *Subbaraya Mudali* v. *The Sub-Collector of Chingleput* [1].

[*S. Srinivasa Aiyangar* :—That is a case of relinquishment. Moreover it has been dissented from in *The Secretary of State* v. *Astamurthi* [2].]

Huddleston, pp. 407, 408, 410, 413 (Judgment of the Provincial Court holding that Tunduwaram is a right of a public character and not a private right at all). 414, 416, 417, 418.

Payment of Tunduwaram is not to be regarded as indicative of private ownership. Smalley and the Board of Revenue say that Tunduwaram was paid for services rendered to the State.

[*Chief Justice* :—They simply refer to the origin of the payment.]

[*Kumarasami Sastri, J* :—Even if a defaulting mirasidar was entitled to Tunduwaram from a stranger or even a pattadar introduced by Government, it cannot be said to be a payment for services.]

I am not referring to the nature which the right developed itself into in course of time. I am referring merely to the origin of the payment.

[*Chief Justice* :—You say that the theory on p. 418 is to be preferred to the opposite theory. Can you give any reasons in support of it besides the ipsi dixit of Smalley and the Board ?]

1. (1883) I. L. R. 6 M. 303. 2. (1888) I. L. R. 13 M. 89.

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No. Huddleston, pp. 418, 419 (para. 21), 421 The remarks at pp. 422, 423 show that the rights of the mirasidars accrued originally from their being descendants of headmen of the village.

[*Chief Justice* :—It is said "apparently".]

Huddleston, pp. 424, 426, 449, 451: whatever might have been the attitude of the Board before 1839, their attitude since that year has been definite and clearly expressed. Huddleston, p. 452 shows that mirasidars have no right to dispose of poramboke or immemorial waste. pp. 454, 455 (Lewin's Judgment).

The principles laid down in that Judgment are against me. The observation in the judgment that immemorial waste belongs to the mirasidars was obiter. Further it was rested on Ellis and Sankariah in preference to Sir Thomas Munro. Why the learned judge should have done so is not clear. Again, the question of ownership did not arise in the case.

[*Kumarasami Sastri, J* :—The suit was in ejectment by a mirasidar and, unless he had some title to the land in suit, his suit was liable to be dismissed. Therefore the question of ownership was directly in issue.]

[*Kumarasami Sastri, J* :—The difficulty I feel is that the highest court in the land decided that the mirasidars were owners and not Government and that view is adopted by the Court of Directors We must take that view as the starting point.]

[*Chief Justice*:—The Provincial Court decided against Government and Government did not carry the matter on appeal to the Sudder Adawlat.]

[*Ayling, J* :—The Directors in their despatch of 1844 interpret this judgment as being in perfect accord with instructions issued by themselves before and in that way seem to approve of its correctness.]

The case was probably not taken to the appellate court because the Government was prepared to concede to the mirasidars a preferential right of cultivation.

[*Kumarasami Sastri, J* :—We come back to the same question—whether the right to be offered a preferential right to cultivate was such title as could sustain an action in ejectment.]

Huddleston, p. 478—There is nothing in the despatch which supports the view that either the law laid down by Lewin was right or that the Court of Directors thought the law with regard to mirasidar's rights in waste must be taken to be settled once for all.

[*Kumarasami Sastri, J* :—What they do say is that if the mirasidar is prepared to cultivate the land, Government has no right to give it to anybody else.]

Huddleston, pp. 484, 485, 530.

The Vyasarpadi case is not against me because there is nothing to show that it related to immemorial waste.

[*Ayling, J*:—Take it that it was nattam ?]

[*Kumarasami Sastri, J*:—The whole argument in the case would be useless if the land was not nattam.]

[*Chief Justice*:—What do you say is the attitude of the Government is as manifested in the later Government Orders ?]

They show that certain privileges attach to the mirasidars.

[*Chief Justice*:—What are the rights of the mirasidars in nattam.]

Government are owners of nattam and the mirasidars have certain privileges with regard to it. They could build upon it themselves, and their tenants can also build upon it. But they have no further rights.

[*Kumarasami Sastri, J*:—What do you say is the nature of this principle ? Is it an interest in property ? Is it an easement or license, and if there is an infringement of the right, has the mirasidar any, and; if so, what remedy ?]

It is a customary right, but, if it is infringed, the mirasidar has no remedy.

[*Kumarasami Sastri, J*:—There can be no right without a remedy in case of its infringement.]

[*Ayling, J*:—Do you put a nattam in a mirasi village on the same footing as a nattam in an ordinary village ?]

Yes ; I do. The mirasidar has no property in the nattam at all. He has no privilege with regard to it except such as Government bestows upon him.

[*Ayling, J*:—It is property dedicated for certain purposes.]

Yes.

[*Kumarasami Sastri, J*:—If you set up the case of a dedication, the question will arise "To whom or for whose benefit?—For the benefit of mirasidars only or strangers also.]

I mean only set apart for communal purposes.

[*Kumarasami Sastri, J*:—You admit the right of the mirasidars to waste other than nattam. Is there any difference in principle between nattam and other waste and is any distinction made between the two in Huddleston's book ?]

The difference is that waste other than nattam is capable of cultivation while nattam is not and therefore belongs to Government absolutely.

Double entry system has itself not been uniform and, if it is regarded as indicative of ownership of the mirasidar, there has been no such entry with regard to this nattam.

[*Kumarasami Sastri, J*:—Probably the mirasidars have been in possession of this nattam.]

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Fakir Muhammad v. *Tirumala Chariar* [1] is entirely opposed to the appellant's contention that immemorial waste is the absolute property of the mirasidars. *Sakkaji Rau* v. *Lakshmana Goundan* [2] holds that the question is one of custom which has to be proved. In this case there is no proof of any custom; at page 153, Ellis's view is considered but not accepted.

[*Kumarasami Sastri, J* :—The other side does not set up any custom which has to be proved. What is said is that as a result of judicial decisions and Government orders the rights of the Mirasidars have been recognised in such a way as to confer a right upon them which cannot now be denied to them.]

[*Chief Justice* :—Are you going to address us at all on the effect, if any, of the recognition of the right by Government?]

[*Kumarasami Sastri, J* :—What is the legal effect of the declaration of the Court of Directors after Lewin's judgment and of the recognition by the Government of the rights of the mirasidars?]

[*Chief Justice* :—What you say is that they are only evidence against Government and are not conclusive, especially as there is evidence the other way.]

Yes.

[*Chief Justice* :—Are there no authorities showing what weight ought to be attached to such evidence. What is to be done if the origin of the right is lost in obscurity?]

The authorities are agreed that the mirasidars were originally the superintendents of the village sites and had such rights over them as were necessary to enable them to enjoy their houses—see Huddleston, p. 135. It may well be that out of the duties of the superintendence thus imposed upon them they have engrafted proprietary rights—See p. 374.

According to another theory as to the origin of the mirasidar's rights, they arose out of dedication.

[*Kumarasami, Sastri, J* :—If you say the sites were dedicated, the Government have no right to introduce purakudis.]

My contention is that the mirasidars are not owners of the sites. Such rights as they have arose out of a license by Government. The fact that the right of superintendence is vested in the mirasidar implies that the ownership is in another. I submit it is in Government.

[*Kumarasami Sastri, J* :—This may be said even with regard to other waste. What is the difference in principle?]

1. (1876) I. L. R. 1 M. 205. 2. (1880) I. L. R. 2 M. 149 (F. B.)

With regard to cultivable waste, the mirasidar had a preferential right to cultivate. With regard to nattam, he has no right whatever.

Subbaraya Mudali v. *The Sub-Collector of Chingleput* [1] proceeds on the basis of a relinquishment of the mirasidar. *The Secretary of State* v. *Ashtamurthi*, [2] has no bearing.

[*Kumarasami Sastri, J*:—It was relied upon for the position that Madras Act II of 1864 took away the right of the Government to take away land of a defaulter and to give it to a stranger.]

[*Ayling, J*:—It was relied upon as doubting the correctness of the decision in *Subbaroya Mudali* v. *The Sub-Collector of Chingleput* [1].]

Sivanatha Naicken v. *Nattu Rangachari* [3] is in my favour.

[*Kumarasami Sastri, J*:—Benson, J. himself treated the decision in the case as proceeding upon its particular facts.—See *Natesa Gramani* v. *Venkatarama Reddi* [4]].

[*Chief Justice*:—It was not the case of a nattam.] *The Secretary of State for India* v. *Krishnayya* is in my favour.

[*Chief Justice*:—That case was from South Canara with regard to which there were numerous despatches of Sir Thomas Munro and they were relied upon mainly.]

Natesa Gramani v. *Venkatarama Reddi* [4] is distinguishable because it proceeds upon a finding of fact in favour of the mirasidar's right to poramboke or waste land, see p. 512.

S. Srinivasa Aiyangar in reply:

The argument of the Government Pleader is twofold.

He admits that, if the mirasidar is in possession, the mirasi tenure can be given effect to; not otherwise. His second argument is that the evidence in this case is not sufficient to raise the presumption of a lost grant, that the case must stand or fall by a custom proved and that no such custom has been proved in this case. There is some evidence with regard to custom.

[*Chief Justice*:—You have to establish the ownership of the mirasidar in gramanattam.]

No: if I prove that the village in question is a mirasi village, then the mirasidar is entitled to nattam and the onus of showing the contrary is on Government.

[*Ayling, J*:—You say that your right is a necessary incident of mirasi tenure, you must prove that incident was recognised by the British Government when it took up the Government of the country.]

1. (1883) I. L. R. 6 M. 303.
2. (1898) I. L. R. 13 M. 89.
3. (1903) I. L. R. 26 M. 371.
4. (1907) I. L. R. 30 M. 510, 511.

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[*Kumarasami Sastri, J*:—You say that it is an incident of a tenure and that it lies on the Government to show that it is not such an incident.]

The tenure is an ancient one and the right in question was an incident of that tenure, and, unless Government shows that it ever refused to recognise the incident, mirasidar must succeed. We have referred to Government Orders and other documents showing that the Government not merely tacitly recognised the incident, but recognised it expressly in solemn declarations.

[*Chief Justice*:—But there were views put forward against the rights of the mirasidars.]

They were not views; they were mere proposals. Further any number of views put forward without giving effect to them by acts will not matter. Not even one document was referred to in which the Government denied the right of the mirasidar.

[*Chief Justice*:—Have you any case showing the effect to be attached to those admissions?]

Our submission is that admissions in favour of Government cannot be used by it; while admissions against it can be used by us. We admit that if it is now shown what the nature of the tenure is and that Government are owners, then we have no case. What we contend for is that the right in question is an admitted incident of the tenure, and in the absence of proof by Government to the contrary the mirasidar must be held to be entitled to the right.

Even as regards the cultivated lands the right of Government to take away the land of the defaulter and to give it to a stranger was only a temporary right. The deprivation of the land was only temporary. With regard to cultivable waste, the mirasidar had the right of himself assigning it to a stranger. That is an incident of ownership. Again, even if Government assigned such land to strangers and gave patta in respect thereof, the mirasidar was entitled to swatantrams and had the right to get back the land from the stranger within 105 years.

[*Chief Justice*:—That right is now obsolete. *Subbaraya Mudali* v. *Sub-Collector of Chingleput* [1] is against you.]

Subbaraya Mudali v. *The Sub-Collector of Chingleput* [1] is not against us really. Innes, J held in favour of our contention. Sir Charles Turner on another point decided against our contention, but his Lordship's opinion was dissented from in *The Secretary of State for India* v. *Ashtamurthi* [2]. Further the question is not whether the right is now obsolete or not. We quite admit that there was a gradual disintegration of the mirasi system.

1. (1883) I. L. R. 6 M. 303. 2. (1890) I. L. R. 13 M. 89.

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What we are trying to show is that the incidents were originally recognised. The right to Tunduwaram is decisive of the question. Although one or two persons expressed the view that Tunduwaram was a fee given to a mirasidar for services rendered, that view was not the prevalent view because we find it stated time out of number that Tunduwaram represented the landlord's share. The payment was an acknowledgment of the landlord's right. *Chinnan* v. *Kondan Naidu* [1]. The word used to represent the right is very important. It is Tunduwaram or Swamibhogam.

A third admitted incident of the tenure is the right of user of the village site. No doubt the mirasidar cannot cultivate nattam, but that, as submitted by us in our opening, is not inconsistent with ownership.

Yet another incident is the right to quarry mines. That right was admitted by Government—See the *Vyasarpadi Case.*

With regard to nattam, the case is quite clear. The nattam was land set apart for the use of the mirasidars. It was not for strangers. Act III of 1905 shows that Government does not claim ownership of house-site and temple site. *Navroji Manikji Wadia* v. *Dastur Kharsedji Mancherji* [2], *Sivaraman Chetti* v. *Muthiah Chetti* [3] show that a village community is capable of owning property.

[*Kumarasami Sastri, J*:—Government may give cultivable waste to a stranger Must it not also have the right to grant him a site for building a house ?]

It cannot because in the case of cultivable waste, the right of Government to revenue comes into question; while nattam is the absolute property of the mirasidars and Government have no right to it even as to revenue. In 1872 the Government said that nattam was the absolute property of the mirasidars. We do not concede that in case of cultivable waste, Government has the right to introduce a stranger.

Papers relating to Nattam separately. Huddleston, p. 127. Supreme Court Judgment of 1873, pp. 129, 132, 133, 149, 184, 185, 219, 368, 373, 374, 377. Chingleput District Manual, p. 138; Huddleston, pp. 383, (shows distinction between the various districts). 384 —Right to quarry and mine referred to in paras. 69, 70.

1. (1913) 26 M. L. J. 169 at 176, 178. 2. (1903) I. L. R. 28 B. 20 at 49.
3. (1888) I. L. R. 12 M. 241 P. C.

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Before 1799 Government took the view that the property in the soil was in the Crown while the Board took the view that the right was in the mirasidars. Place, when he was appointed, was of opinion that the Board's view was right. On investigation, however, he came to the opposite conclusion and began to settle consistently with the rights of mirasidars. His opinions therefore are entitled to very great weight. If, therefore, as is the case here, Government have after full consideration of the question, formally recognised the rights of the mirasidars to (1) preferential cultivation, (2) Tunduwaram, (3) Gramanattam, which alone they ever claimed. The recognitions will be held to be formal declarations by the Government of the rights of the Mirasidars, which it cannot now go back upon. If this contention is accepted, it is unnecessary for your Lordships to go into the origin of the tenure. Fifth Report at pp. 42, 45, 46 shows that Madras stood upon a separate footing. pp. 84, 85 87.

Cases relating to Gramanattam. Huddleston, papers 93, 90 pp. 533, 555, Maclean's Manual of Administration of Madras Presidency, Vol. 1, p. 125, para 535. The balance of authority is in favour of the mirasidar's right. See Baden-Powell's book referred to above, pp. 362, 374, 368, 369, 371, 378. *Fakir Muhammad* v. *Tirumala Chariar* [1] is doubted in *The Secretary of State in Council* v. *Nurja* [2]; *Sakkaji Rau* v. *Latchmana Gounden* [3] at 158 was a case before Settlement of Chingleput. *Subbaroya Mudali* v. *The Sub-Collector of Chingleput* [4] is a case of relinquishment.

The Court expressed the following

The Chief Justice.

OPINIONS:—*The Chief Justice*:—The question referred to us is, whether in a mirasi village the mirasidar is entitled to recover possession of a house site held under a patta from Government; and, to show what it involves, it may be well to state at once the circumstances in which it arises in the case under appeal. On the 16th November 1894 Mr. George Stuart Forbes, Acting Collector of Chingleput, passed orders on certain petitions praying for an extension of the cheri nattam, or part of the village site reserved for pariahs, in the village of Mannur in the Saidapet Taluk not far from Madras. He began by observing that out of the whole Survey No. 14 A of 23 acres which was classed as village site, 97 cents, or nearly one acre, identical with Survey No 45 in the paimash or old survey, was shown in the paimash account as "Cherial Pizhakkadai" or reserved for pariahs. There had, he went on to say,

1. (1876) I. L. R. 1 M. 205.
2. (1882) I. L. R. 5 M. 163.
3. (1880) I. L. R. 2 M. 149.
4. (1883) I. L. R. 6 M. 203.

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been no erection on this site by any mirasidar since the date of the paimash (apparently about 1845) and the only building on it was an arrack shop. He did not interfere with this, but stated that the rest of the plot was available for sites in extension of the paracheri or pariahs' quarters, and directed it to be laid out in streets and house sites in such a manner as to facilitate sanitation and the convenience of the residents. As regards any claims from mirasidars, he merely observed that "the short usurpation by the mirasidars in recent times which is supported by the entry in the Adangal of 'Seshachellam Chetty (plaintiff) and others', is invalid and cannot be recognized." The Adangal (Exhibit G) is described as the village account of lands held in the village according to Survey numbers. The paimash register only contained the names of actual occupiers of sites in the nattam, as appears from Exhibit X, but in 1886 it came to light that at some time or other the names of the mirasidars had been inserted in the Adangal as well the names of the actual occupiers which alone appeared in the paimash register, and had also been inserted as owners of the unoccupied sites as regards which no names appeared in the paimash register; and this was apparently what Mr. Forbes was alluding to in speaking of the recent usurpation. Exhibits I to VIII are applications for sites put in immediately after the Collector's order by residents in the paracheri which, the endorsements show, were granted or refused according to the merits. This was in 1894 and early in 1895, and the present suit was not brought until January 1905 ten years later. The plaint alleges that the plot was the property of the plaintiffs and that they constructed and rented to the 13th defendant a, leaf-roofed shop marked B in the annexed plan; that the defendants on 17-10-1903 took wrongful possession of the plot and erected the shed marked C; and that defendants 1 to 12 with the 13th defendant afterwards dismantled the shop B and erected the sheds D and E. Defendants 1 to 12 pleaded that the site was not the property of the plaintiffs but of Government who had granted the sites thereon. They alleged that the buildings C (a mission hall) and E (a sundries bazaar) had always been in existence and that D had been erected three or four months previously as the shop B was in a ruined state. The 13th defendant pleaded that he was only a servant of the owner of the toddy-shop, and the latter was added as 14th defendant but remained *ex parte*. The District Munsif at first dismissed the suit on the ground that the Secretary of State in Council was not a party, but on appeal the plaintiffs undertook to make him a party, and this having been done, the Collector filed a written statement on his behalf as 15th defendant in which he alleged that the plaintiffs have not and never had any title to the property, and never

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occupied it in a manner inconsistent with the rights of Government, and that Government had exercised rights of ownership over it to the knowledge of the mirasidars. The entries in the village accounts for some years by officers who were themselves mirasidars were, it was alleged, only paper entries and did not affect the proprietary right of Government. In his judgment the District Munsif observed that in the Settlement Register Exhibit F (1875) the names of the 1st plaintiff and the other mirasidars were not entered against Survey No. 14 A, the village site, and thenceforward they had never taken any steps to assert the right to the land and have it included in their pangu lands. The District Judge took the same view and observed that the plaintiffs had never cultivated the land, and had put up the thatched hut B in 1902 long after Government had assigned the sites. They accordingly dismissed the suit but held it was not barred as it was instituted within 12 years of the grants made under Mr. Forbes's orders at the end of 1894. The result of the findings would therefore appear to be that the site in question was waste land over which the plaintiffs never exercised any rights of ownership until some years after it had been allotted by Government in extension of the cheri or pariah's quarters.

The Privy Council have very recently pointed out in *Secretary of State for India* v. *Bai Rajbai*, [1] that, as regards lands such as these which have been ceded by native rulers, the only enforceable rights are those conferred by the Crown by express or implied agreement or by legislation; but in order rightly to appreciate the action of the Crown or Government, it is necessary to know something of the pre-existing state of things. We have not been referred to any critical discussion of the legendary settlement of Thondamandalam, as this part of the country was called, by 300,000 Vellalas from the west coast of India which is referred to in the judgment of Sankaran Nair, J., and had been dismissed as fabulous by Sir Thomas Munro in his well-known minute. What we do know is that this District was the seat of an ancient civilisation, and that Kanchi or Conjeevaram was the capital of the Pallava dynasty who flourished until their overthrow by the Cholas about the end of the 9th century; and that it was afterwards one of the principal cities in the Chola kingdom, which again was absorbed in the Vijianagar Empire in the 15th century. That Empire had fallen into decay, when in the middle of the 17th century one of its nominal dependents granted the East India Company four mirasi villages on which Fort St. George and the adjoining White and Black Towns, as they were then

1. (1915) L. R. 42 I. A. 229=29 M. L. J. 242.

called, were erected. To these was added some years later, the Shrotriem Village of Triplicane; and after the advent of the Mahomedans three more mirasi villages which are now included in the Municipal limits of Madras were granted in 1694 during the reign of Aurangazib. Further grants were made early in the 18th century of villages with what are now within the Municipal limits and beyond; and finally the whole District of Chingleput as it now is was assigned by the Nabob of Carnatic to the Company in return for their services against his enemies and became known as the Jaghir. It was subsequently laid waste by Hyder in his invasion of the Carnatic, and it was only some years after 1784 when peace was restored that the question with which we are now concerned came to the front in connection with the proposed introduction of a permanent settlement on the lines on which Lord Cornwallis had carried out the Permanent Settlement of Bengal, and it became necessary to investigate the position and rights of the mirasidars in relation to the land. If they were the real owners of the land it could not be parcelled out among Zamindars under Regulation XXV of 1802 which reproduced the Bengal Regulation of 1793; and later, when the idea of a permanent settlement was given up and the system of ryotwari settlement with the individual cultivator was coming into favour, this alleged ownership of the mirasidars was again an obstacle to the introduction of settlements with the actual cultivators. The result of the controversy in the early years of last century was that the settlement was made with the mirasidars and not with Zemindars or with the actual cultivators; but many questions such as those with which we are dealing were left outstanding and, lapse of time has not made it any easier to settle them in spite of the lengthy discussions which are to be found in the Mirasi Papers which go down to 1864 and in the further papers which have been specially printed for this case.

It is unnecessary to go into old controversies as to ownership of land in India as to whether, as has been sometimes held, the State was the owner of all land which it had not actually alienated and the cultivators were merely tenants under it, or whether the cultivators are the owners subject to the right of the State to share in the produce or whether, as James Mill thought, (Fifth Report Ed. Higginbotham page 816), Government and the cultivators should be regarded as "joint tenants" by which he probably meant co-owners. In 1796 (Mirasi Papers 26) the Madras Government went so far as to assert it to be the great feature in all the Governments of India that the Sovereign is the Lord of the soil. As regards waste lands at any rate it seems clear,

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as held in *The Secretary of State for India* v. *M. Krishnayya*, [1] that by the Mahomedans waste lands in conquered countries were always held to be the property of the State. It may be taken then that the principle to start with generally is that in India waste or unoccupied lands at any rate belong to the State, and the Madras Legislature has in Madras Act III of 1905, which is modelled on Bombay Act V of 1879, given statutory force to this rule which had previously been held applicable to lands of this character.

The question then is, whether unoccupied lands in mirasi villages in this District, and more especially the unoccupied lands set apart for house sites in the villages, form an exception to the general rule and were recognised as private property when or after the British Government succeeded to the previous rulers. The distinctive thing about the District is the persistence until very recent times of the system of joint cultivation of the village lands by the village community of mirasidars, the actual cultivation being done by a dependent population working under them. This is a stage of agricultural development through which various peoples have passed and of which traces are to be found in England, Germany and Russia, both European and Asiatic, and even in Japan. (See Lewinski's Origin of Property, London, Constable and Co. 1913), but it by no means necessarily connotes the ownership by the cultivators of the adjoining waste or unoccupied lands, or implies that the cultivators have greater rights in respect to them than inhabitants of other villages in the neighbourhood where the system does not prevail as was pointed by Sir Thomas Munro. The right of the State to admit cultivators to uncultivated land for the purpose of realizing its revenue which is a necessary incident of the immemorial revenue system and is recognized in the recently published Arthasastra of Kautilya dating from 300 B. C, Bk. 2, C. 1, S. 47 necessarily involves the right of the State to provide such cultivators with sites as the nuttam. Nor is it a necessary inference that the village community owned all the land within the boundaries of the village, for as observed by Mr. Hodgson in the Report on the Survey of Dindigul (1) note (Fifth Report : Ed. Higginbotham Co. at page 607) "the whole lands of a province in India whether cultivable, arable, waste, jungle or hills have been from time immemorial apportioned to a particular village so that all lands are within the known boundaries of some village. The total area of all villages forms the whole landed surface of that particular province. And there is satisfactory evidence, as appears from Mr. S. Krishnaswami Aiyangar's Ancient India and Mr. Vincent Smith's Early History of India 3rd Edition 1913, that under the Cholas the lands and cultivation were carefully surveyed and holding registered at least a century before our Domesday Survey.

1. (1905) I. L. R. 28 Mad. 251

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It is perhaps hardly safe to make any positive assertion about the ownership of the nattam and other unoccupied lands in periods so remote as to which the evidence is so scanty, but the great irrigation works, and temples which have come down to us from this period and were probably produced by forced labour point to active intervention and control by the State and do not support the conclusion that the village cultivators whether cultivating jointly or individually were regarded as the owners of land which they had not reclaimed to cultivation in the absence of evidence of user or recognition.

As evidence of recognition it is said by Sankariah in the Mirasi Papers that former rulers were in the habit of purchasing lands from the villagers to present them to temples and in the three volumes of Dr Hultzsch's South Indian Inscriptions there are inscriptions nearly a thousand years old that appear to bear this out, but it does not appear that the lands so acquired were waste.

Nor is such a view supported by what we know of the history of the mirasi villages now included in the municipal limits of Madras which, as already mentioned, were acquired in the 17th century and the years immediately following long before the present controversy arose. The three bulky volumes, recently brought out by Col. Love for the Government of India under the title of "Vestiges of Old Madras", contain a digest of all that is to be found in the records about the city from its foundation down to the end of the 18th century; and it is remarkable that they do not appear to support the claim of the mirasidars to the waste lands of the villages. Such references as there are seem to show that the Madras Government treated all waste lands as at its disposal and the claim would appear not to have been disputed. See Vol. I pp. 170, 579—80. Vol. II p. 127 and pp. 193 an 194. In Vol. II p. 505 under the year 1763 we find mention of numerous leases granted by the Company of large areas for the erection of the garden houses that form a feature of the city; and Mr. Ellis' answer in the Mirasi Papers to the 9th question put to him suggests that, when he wrote in 1814, a great part of the village lands had been converted into gardens in this way; and in the suit in the Supreme Court in 1808, which will be referred to later, Sir Thomas Strange C. J. stated that the only cases as regards mirasi villages which came before the Mayor's Court in the 18th century dealt with another question.

The fact relied on by Sankaran Nair J. that in the conveyances of the 18th and early 19th centuries which are collected in the Mirasi Papers the transferor purports to convey not only his cultivable lands but also all his rights in the nuttam and the waste lands which had not been divided, and in fact deals with them as the subject of co-ownership is of course to be considered, but as againt the State

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which was the other party interested such claims appear not to be entitled to much weight except in so far as they are supported by actual user or recognition.

Coming now to the views expressed by Mr. Place and later by Mr. Ellis, Collector of Madras, and his Sheristadar Sankariah in answer to the questions put by the Board of Revenue in 1814 (Mirasi Papers 155), though they were no doubt well warranted in championing the mirasidars and asserting their proprietary interests against proposals to ignore them either in favour of Zemindars or of the actual cultivators, it by no means follows that the mirasidars were the owners of the waste lands in the village as well as of the lands they had reclaimed to cultivation. Sankariah, a successful official of those days, who, as was pointed out by my learned brother in the course of the argument was almost certainly a mirasidar himself, no doubt says distinctly that they owned the waste, but Mr. Ellis speaks only to a restricted right of user falling short of full ownership.

Eventually even as regards cultivable waste the mirasidars' ownership has not been fully established and though they had and still have a preferential right to such lands, yet on failure to cultivate them they are liable to have cultivators put in by Government. Mr. Ellis and Sankariah no doubt claim that they were entitled to be restored within 105 years on making compensation, but that claim has not been substantiated. No doubt their claim to receive swatantrams, or payments from the newly admitted cultivators, is evidence of their claim to ownership of the waste which they had reclaimed to cultivation; but, according to the decision of the Full Bench in *Sakkaji Rau* v. *Latchmana Gaundan* 1 such swatantrams are not generally payable but only on proof of custom. Further Mr. Ellis' views have never won complete acceptance. In 1822 (Mirasi Papers p. 423) the Court of Directors found fault with the Madras Government for having printed and circulated to the service the answers of Mr. Ellis, as a question of this kind should be decided not upon one man's opinions alone but upon a consideration of all the evidence which could be obtained. They considered the course adopted would to a great degree have the effect of imposing upon the service the opinions of Mr. Ellis as the authoritative conclusion of Government. The Government in reply disclaimed any such intention, and we find the Board of Revenue treating the question of the extent of the mirasidars' rights in waste lands as an open one and framing a fresh series of questions for Collectors on the subject(Mirasi Papers 427) on the 11th December 1823. The Government of Sir Thomas Munro did not pass any orders on these proceedings so that fresh queries were never sent

1. (1880) I. L. R. 2. Mad. 149.

to Collectors; and on 31—12—1824 Sir Thomas Munro wrote his well-known Minute on the state of the country and the condition of the people in which speaking with his wide experience gained by him as a settlement officer in various districts of Southern India as to the system prevailing under the Vijianagar and Mahomedan rulers he incidentally contested nearly all Mr. Ellis' opinions and conclusions. Selections from the Minutes of Sir Thomas Munro, (Ed. Arbuthnot, Madras. Ed. Higginbotham, 1886, p. 228.) The question discussed by Sir Thomas Munro no doubt related to the cultivable waste rather than to waste which was excluded from cultivation either as unfit or as reserved for other purposes; but there can be no doubt that he would have expressed himself as strongly as regards the ownership of waste excluded from cultivation.

The paimash survey and accounts of the District appear from the District Manual to date from the years immediately following, and the extract from the paimash accounts (Exhibit X.) exhibited in this case and dating it is said from 1845 shows that, while the name of the owner is given in the case of each occupied site in the nattam, no name is entered against the unoccupied portions, which goes to show that the private ownership of the unoccupied nattam was not then recognized. In 1839 the Board (Mirasi Papers, 452) expressed the opinion "that as regards immemorial waste the rights of the mirasidars are confined to the pasturing of their cattle, the cutting of firewood etc., and similar common privileges, but these must always give way to any proposition ensuring the extension and realisation of the public revenue." The passage is important as it was cited by the Full Bench in *Sakkaji Ram* v. *Latchmana Gounden* [1] and adopted as laying down the true rule in *Sivanatha Naicken* v. *Nattu Ranga Chari* [2].

We are not however immediately concerned in this case with the general question of the ownership of waste lands but with the ownership of part of the village nattam or village site. The nattam or area reserved for house sites is a feature of every village, zamindari, ryotwari and mirasi alike, and consists of unassessed land set apart for the erection of houses and for the adjoining backyards. In Dr. Hultzsch's South Indian Inscriptions, Vol. II, pt. 1, No. 4, we find the *ur-nattam* and *paracheri*, or pariahs' quarters, enumerated with tanks and burying grounds as free from assessment, and there are other inscriptions of the same kind showing that a portion of the site was set apart for pariahs or untouchables from very early times. So far as the inscriptions enable us to judge, the affairs of the village appear to have been managed by sabhas or assemblies of leading men in the village who were probably left to allot house sites as the occasion arose

1. (1876) I. L. R., 2 M. 149. 2. (1903) I. L. R., 26 Mad. 371.

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without nterference. Such a power of allotment would not connote ownership, but might of course give rise to it if it led to the sites being dealt with as private property and sold or leased as such.

As regards waste lands generally the Mirasi Papers contain discussions as to whether the mirasidars were entitled to compensation for waste lands acquired for public purposes, and that such claims were in some instances admitted appears not only from the instances given but also from the fact mentioned in the Chingleput District Manual and also by Mr. Stuart in his Report in 1909 that Government in 1870 decided to refuse any longer to pay compensation for such lands. The case which subsequently came before Sir Charles Turner will be considered later. As regards the nattam itself in 1856 (Mirasi Papers, 538, 553) the question was the subject of a strong divergence of views between the Board of Revenue and the Government of the day which favoured the mirasidars' claims and went so far as to dispossess in his favour a stranger whom the mirasidar had sued unsuccessfully in the Civil Courts. The papers were sent home, but the Court of Directors in their reply did not commit themselves to one view or the other.

In 1869 Government framed Dharkast rules (as to applications for grants of land) in the District in which the prior claims of the mirasidars were recognised. Rule 13 however provided that tanks, threshing floors, burying grounds etc., should not be given away on dharkast and concluded "applications for gramanattam or village sites shall not be entertained." In 1872 as appears from G. O. dated 16th December 1872 No. 1684,* the Board called for returns from Collectors as to the practice in their districts of giving gramanattam land as house-sites to persons who were neither pattadars nor actual cultivators; and the answer from Chingleput was it was granted to all applicants on a fixed scale. This goes to show that the mirasidars were, to say the least, not then very conscious of their rights now claimed for them. Commenting on the answers returned, the Board put forward the view that the gramanattam in villages is the communal property of the villagers, a position which may be taken up with regard to non-mirasi as well as to mirasi villages. But the Government of the day were not prepared to go so far, as they were of opinion that the old hookamnamahs showed that enjoyment of the gramanattam was subject to regulation by Government. These hookamnamahs no doubt related to non-mirasi villages, for as already observed, whatever the ownership of the nattam, the mirasidars were probably left to allot sites in the nattam according to requirements and this was probably not interfered with by the Mahomedan rulers who generally rented the villages to the mirasidars themselves at a fixed rental,

* See Appendix A.

except in so far as they may have granted villages in inam. The District Manual contains a long list of inams, but there are no particulars of the dates or terms of the grants. In passing orders on this occasion asserting the title of Government in the nattam in ordinary villages Government made an exception in favour of purely mirasi villages where they said "the gramanattam no doubt appertains to the mirasidars equally with the other poramboke." Accordingly they issued rules on the subject excepting Zemindari and mirasi villages and villages which were private property, although the Collector's answer showed that the grants of nattam had been made by Government without opposition in Chingleput. Two years later however when the settlement of Chingleput was effected an entry was made in the settlement register of each village (cf. Exhibit F) that in the gramanattam no new enclosure was to be made or new building erected without permission in future, which shows that the nattam was not then treated as completely at the disposal of the mirasidars. The G. O. dated 18th August 1886 No. 724 Rev. contains a Board's proceeding rejecting the claim of the mirasidars to control the cherinattam in which the claims of the mirasidars are vigorously attacked on much the same grounds as have been urged before us, and Government did not interfere with the Board's decision but recorded the proceedings without remark. In 1890 Government followed this up by directing that in the Adangal accounts, where in addition to the name of the occupier the name of the mirasidar was found, it should no longer be recorded. The paimash register Exhibit X in this case only gives the names of the owners of sites in actual occupation and does not show any owner against No. 45 the suit land but merely describes it as the backyard of the cherimen. At some subsequent period the names of the mirasidars were entered as owners in the Adangal account, not only of unoccupied sites like this, but also of the occupied sites. It was alleged that this had been done surreptitiously to create evidence of ownership and the mirasidars' names were struck out in cases where there was an occupier, but apparently were left in when the site was unoccupied. In these circumstances I cannot give the entries in the Adangal accounts the weight that might otherwise attach to them. The question came up again in 1892 when Government expressed themselves more guardedly observing " the question of the ownership of pariah house-sites is one of legal right and if the mirasidars have it they can only be expropriated by compensation." Lastly we have the report of the Special Settlement Officer Mr. Stuart in G. O. 2868 dated 19—10—1909 which shows that where the mirasi right is in the hands of a few, the claim to the village site is still often kept alive and used for the purpose of keeping the rest of the population in subjection, and that in other cases no attempt is made to enforce it.

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Coming now to the decisions of the Courts—the judgment of Sir Thomas Strange in 1808 in the *Thondiarpet case* (Mirasi Papers, 127) shows that the right of the mirasidars to the village site was proved in that case by abundant oral evidence to the satisfaction of the Chief Justice who however observed that it did not appear and was not material in which respect, if any, the mirasidars were subject to the intervention of Government except for the sircar share. The principle which was laid down and on which the judgment proceeded was that the nature of mirasi right was to be ascertained by user; and that still appears to me to be the governing test. In 1841 (Mirasi Papers, 462) we have the judgment of Mr. Lewin in the Provincial Court of Chingleput in a suit to which Government was a party and did not appeal, in which as to cultivable waste the law was taken from Mr. Ellis' answers and Government were held to have no right to issue cowles of lands in mirasi villages which the mirasidars were willing to cultivate. This does not really amount to more than a recognition of the mirasidars' preferential right to cultivate, and must now be read with the subsequent Full Bench decision in *Sakkaji Row* v. *Latchmana Goundan* [1]. The judgment in 1849 of Sudder Adalut in Special Appeal No. 108 of 1844 (Mirasi Papers, 486) is more directly in point as it recognised the mirasidars as the hereditary proprietors of the soil including the nattam, and laid down that if a purakudi ceased to cultivate he became a casawargam and liable to pay rent for his backyard to the mirasidar who clearly had the right of ejection. The judgment in Special Appeal No. 186 of 1859 (Mirasi Papers, 585) was also a suit in which the mirasidar was held entitled to evict the casawargam tenant from a house-site which had been in his occupation for a great number of years on paying compensation for the buildings he had suffered the defendants to construct and occupy. The fact that these two cases are from Kumbakonam does not detract from their weight, as the rights of the mirasidar were fuller in Chingleput than in Tanjore. Coming now to the year 1882, in that year Sir Charles Turner, C. J., in a suit* to which Government was a party upheld the right of the mirasidars to compensation for a piece of waste land in the village of Vyasarpadi on the authority of Mr. Ellis and Mr. Sankariah, and there was no appeal from his decision. There was also a decree of the District Munsif of Trivellore in O. S. No. 31 of 1894 in which the right of the mirasidar to the nuttam was asserted though it was at the same time held that the mirasidar was liable to be assessed for cultivation on the nuttam. There was no appeal, and the papers suggest that Government was not anxious to bring the question before the higher Courts in the hope apparently that the mirasidars' claims

1. (1876) I. L. R. 2 Mad. 149.

* See Supra p. 18.

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would die out of themselves. In *Sivanatha Naicken* v. *Nattu Ranga Chari* [1] Davies and Benson, JJ., in Second Appeal refused to interfere with the finding of the Lower Courts that the Shrotriemdar in that case, who stood in the place of Government, and not the mirasidars of the village, were entitled to the compensation for a piece of waste land in a mirasi village compulsorily acquired. There was evidence of user in the particular case, but the learned Judges laid down generally that "the rights of the mirasidars over immemorial waste (apart from their preferential right to cultivate) appear to be confined to grazing, cutting firewood and similar common privileges as stated by the Board of Revenue in 1839 in the passage already quoted in this Court's judgment in *Sakkaji Rau* v. *Latchmana Goundan* [2]; but those rights were liable to be extinguished by the Government alienating the land." This passage does not however deal directly with the ownership of the nattam. In the South Canara forest case, *The Secretary of State for India* v. *M. Krishnayya* [3], Benson, J., delivering the judgment of the Full Bench again laid down that both under the Hindu and Mahomedan Governments waste lands belonged to the State, and observed incidentally that the right of Government to the waste lands had now after protracted contest been established as against the mirasidars on the East Coast, but this point did not arise for decision. We have also been referred to the decision of Benson, J. and myself and in *Natesa Gramani* v. *Venkatarama Reddi* [4], where we upheld the finding of the two lower Courts on the evidence that a certain tank in a shrotriem mirasi village belonged to the mirasidars and not to the Shrotriemdar, or Government assignee. I do not think that Benson, J. who wrote the judgment intended to lay down anything inconsistent with the opinions expressed by him in *Sivanatha Naicken* v. *Nattu Ranga Chari* [1] and *The Secretary of State for India* v. *M. Krishnayya* [3]. The decision in *Sivanatha Naicken* v. *Nattu Ranga Chari* [1] was explained as having proceeded on the facts proved as to the particular village, and not as laying down as matter of law that poramboke lands in mirasi villages must necessarily be the property of the Zamindar, that is to say, of Government or its assignee.

I have now dealt with the most important aspects of the question, and it only remains for me to formulate my conclusions in this important and difficult case. The village nattam is land in the village set apart from time immemorial for house-sites and cannot be used for any other purpose so long as it retains its character as nattam. On the evidence with which I have dealt I am not satisfied that before

1. (1903) I. L R. 26 Mad. 371. 2. (1876) I. L. R. 2 Mad. 149.
3. (1905) I. L. R. 28 Mad. 257. 4. (1907) I. L R. 30 Mad 510=17 M. L. J. 447.

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the advent of British rule and especially under the Mahomedan Government unoccupied nattam was generally recognized by Government as the private property of the mirasidars, though no doubt where, as was frequently the case, they were themselves renters of the village, the control would remain in their hands, and they may in individual cases have exercised full rights of ownership over it.

The next question is—has the mirasidars' ownership been established subsequently either by Government recognition or by judicial decision in the proceedings and cases to which I have referred. As regards recognition, it cannot be said that the Board of Directors, or their successor, the Secretary of State, have ever recognized the mirasidars as owners of the nattam, and the varying views of successive Governments in Madras on a subject which has never ceased to be controversial do not appear to me to establish any general right based on recognition.

As regards the cases, some of the early decisions are not reconcilable with the observations in recent cases such as *Sivanatha Naicken Nattu* v. *Rangachari* [1] and *Secretary of State for India* v. *Krishnayya* [2] and, if I may say so with respect, appear to proceed on an unreserved acceptance of the views of Mr. Ellis and Sankariah which appears to me to be an unsatisfactory basis. Even the unreported judgment of Sir Charles Turner is open to this observation. The question is one of great difficulty owing to the unsatisfactory character of the materials on which we have to base our judgment; but on the whole after the fullest consideration of the case in all the aspects that have been presented to us, I do not think that these materials warrant us in laying down the broad proposition that unoccupied nattam in this District is the private property of the mirasidars, and I am of opinion that the question should rather be decided on the evidence in each case and with special reference to user which will probably not be found to be uniform. This was to some extent the test recognised in *Natesa Gramani* v. *Venkatarama Reddi* [3], one of the latest decisions, and a similar course was adopted by Sir Charles Turner and the other members of the Full Bench who decided *Sakkaji Rau* v. *Latchmana Goundan* [4], as to the mirasidars' claim to swatantrums which in effect involved their claim to ownership of the cultivable waste, that is to say, of the land in the village which they had presumably reclaimed to cultivation but had ceased to cultivate, a claim which was at least as strong as the present claim to the

1. (1903) I. L. R. 26 Mad. 371.
2. (1905) I. L. R. 28 Mad. 257.
3. (1907) I. L. R. 30 Mad. 510.
4. (1876) I. L. R. 2 Mad. 149.

unoccupied nattam. In this case, as in that, user must in my opinion be the governing consideration.

I may add that the preferential right of the mirasidars to cultivable waste which is now well established does not appear to me to be of itself a sufficient foundation for the general proposition that they are entitled to eject inhabitants of the village from portions of the unoccupied nattam granted to them by Government, though they may be entitled as incidental to such right of preferential cultivation to the allotment of sites on the unoccupied nattam when necessary.

In the result, I am of opinion that there is no general presumption of the mirasidars' ownership of the nattam in the absence of evidence of user, but that where user is shown the presumption of ownership readily arises.

Ayling, J.

Ayling, J.:—The question propounded for us to answer is as follows:—

"Whether, in a mirasi village, the mirasidar is entitled to recover possession of a house-site held under a patta from Government."

Slightly amplified I take its meaning to be this:

Where in a mirasi village a person has been granted a portion of the nattam poramboke for use as house-site by a duly authorised Government officer, can the mirasidar *by virtue of any right, privilege or title inherent in him as mirasidar* disregard the grant of the house-site by such officer, and evict the grantee from possession?

In the plaint the suit property is claimed by plaintiffs as absolute owners. How far this claim was intended to be based on the adverse individual enjoyment which has been found against by both the lower courts is not clear: but I do not think it has been seriously argued by the learned Vakil who represented them in this Court that their interest in the property amounted to absolute ownership, *i.e.*, ownership without restriction as to the way in which the property should be utilised. Such a claim would in effect only be supported on the theory that every inch of land within the boundaries of a mirasi village was equally and entirely the property of the mirasidar—subject only to liability to pay land revenue to the Circar. It is quite certain that no such claim has ever been recognised by Government or the Courts even if it was ever advanced. It is not disputed that the right of the mirasidar to deal with various kinds of land in his village is clogged with various restrictions. This is clear even from the authority most relied on by appellants: *vide* Mr. Ellis' report at page 184 of the Mirasi Papers. Tank, road, threshing floor and other descriptions of poramboke lands, not excepting the nattam or house-site poramboke with which we are immediately concerned, can only be utilised for the purpose indicated by the description of each: while it

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is admitted that cultivable land can under certain circumstances be assigned by Government to a non-mirasidar, and it has been held in *Fakir Muhammad* v. *Tirumala Chariar* 1 that a mirasidar cannot without the permission of Government break up immemorial waste and bring it under cultivation. Obviously then "mirasi" does not imply any general rule of complete ownership over all the lands of the village: and what we have to consider is whether this power to evict under the circumstances contemplated by the reference is an incident of mirasi and whether it has been recognised by Government. That the latter is a necessary condition of enforceability has been laid down in the most trenchant terms by their Lordships of the Privy Council in a very recent case (*Secretary of State for India* v. *Bai Rajbai*. 2 They say:—"Before dealing with the action which the Government of Bombay took in reference to this village of Charodi on receipt of these reports it is essential to consider what was the precise relation in which the Kasbatis stood to the Bombay Government the moment the cession of their territory took effect, and what were the legal rights enforceable in the tribunals of their new Sovereign, of which they were thereafter possessed. The relation in which they stood to their native Sovereigns before this cession, and the legal rights they enjoyed under them, are save in one respect, entirely irrelevant matters. They could not carry in under the new regime the legal rights, of any which they might have enjoyed under the old. The only legal enforceable rights they could have as against their new Sovereign were those, and only those, which that new Sovereign, by agreement expressed or implied or by legislation, chose to confer upon them. Of course this implied agreement might be proved by circumstantial evidence, such as the mode of dealing with them which the new Sovereign adopted, his recognition of their old rights and express or implied election to respect them and be bound by them, and it is only for the purpose of determining whether and to what extent the new Sovereign has recognised these ante-cession rights of the Kasbatis and has elected or agreed to be bound by them, that the consideration of the existence, nature, or extent of these rights become relevant subjects for enquiry in this case."

Whatever view is taken of the origin of mirasi tenure (which is entirely a matter of speculation) and the privileges it confers, there are undoubtedly certain incidents, which have been claimed as attaching to it from ancient times, and have to some extent been recognised. They are;—

(*a*) The right to hold his maniam lands free of all payment of land revenue.

1. (1876) I. L. R. 1 Mad. 205.
2. (1915) L. R. 42 I. A. 229=29 M. L. J. 242=I. L. R., 39 B. 625.

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(b) The right to hold his patta lands in absolute ownership subject to the payment of such assessment as the State may impose.
(c) A preferential right to cultivation of all lands, which have been brought under, but have gone out of, cultivation (seykal karambu).
(d) The right to certain fees (tunduvaram) on lands granted for cultivation to non-mirasi cultivators (payakaris).
(e) Certain rights over immemorial waste.
(f) Certain rights over lands set apart for various communal or public purposes; *e. g.*, tanks, village site, threshing floor etc.

Now all these rights may have a common origin in the status of the mirasidar : but none of them necessarily involves another, and, as will be seen, they vary with the description of land to which they relate. Each, as it seems to me, requires to be separately established: and recognition by the State, whether express or implied, is an indispensable condition for the enforcement of each. It may be argued that the existence or recognition of one renders probable the existence or recognition of another : and this indirect evidence will be dealt with later. But it seems to me more convenient to start with direct evidence regarding the peculiar incident with which we are concerned—that is, the rights of the mirasidar as such over the village nattam.

"Nattam" is a particular variety of poramboke land. Poramboke is defined in Wilson's Glossary thus: "Such portions of an estate or village lands liable to revenue as do not admit of cultivation, and are therefore exempt from the assessment, as sterile or waste land, rock, water, wilderness, site of dwellings and the like: also common land near a town: any place situated out of or beyond certain limits."

Nattam is the "site of dwellings" above referred to. It does not admit of cultivation and is exempt from assessment, not because it is unfit by nature for the plough (it is frequently cultivated licitly and illicitly); but because it is required and set apart for an indispensable purpose—the building of houses for the various members of the village community. Wherever the ownership or quasi-ownership lies, this overriding limitation is respected by both parties. The mirasidars do not claim to be entitled to bring nattam under cultivation except in the limited and special way incidental to the backyard of a house: and Government do not claim the right of granting it on patta for cultivation purposes subject to the payment of assessment. Such a course is in fact expressly forbidden in the Board's Standing Orders.

In fact the dispute between Government and the mirasidars as regards nattam practically amounts to this: in whom rests the right

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and duty of apportioning the unoccupied "nattam" so as to ensure its utilisation for the appointed purpose?

Now in deciding this question the plaintiffs, who are the parties seeking relief in this case, wish to override the general presumption of the common law of India that the ownership of all unoccupied land vests in Government. If authority be needed in support of this presumption I may cite *Subbaraya* v. *Krishnappa*, [1] *The Secretary of State for India* v. *M. Krishnayya* [2], *Madathapu Ramayya* v. *The Secretary of State for India* [3] *Bhaskarappa* v. *The Collector of North Kanara* [4]. In *Madathapu Ramayya* v. *The Secretary of State for India* [2], Bashyam Aiyangar, J. says at page 393 that presumably the freehold in the soil of grama-nattam or village site is in Government. He was of course speaking of an ordinary ryotwari village where no mirasi claims can be set up, but there is no doubt that the presumption of Government ownership applies to nattam lands in ordinary ryotwari villages the ownership being subject to the important limitation above referred to. Even in this latter respect it is not denied that where the nattam in an ordinary ryotwari village is in excess of what is reasonably required, Government may transfer a portion to "ayan" (assessed) and grant it on darkhast. I mention this specific reference to nattam in view of the possible suggestion that the presumption is inapplicable to poramboke lands.

The right of Government to allot nattam in ordinary villages has in fact never to my knowledge been questioned: and an elaborate series of rules has been framed for the guidance of Revenue officers. (*Vide* Board's Standing Orders 21).

The presumption has now been embodied in S. 2 of Act III of 1905, and it is very remarkable that there is no mention of mirasidar among the numerous classes, whose rights are specifically excepted. There is no reason to suppose that the act was intended to put an end to any existing right and the mirasidar might probably shelter himself behind the clause "all customary rights legally subsisting." But the section is important both as embodying the presumption in an enactment, and as indicating that in 1905 at any rate the legislature treated the peculiar rights claimed by mirasidars as on a different footing from those of Jenmis and wargdars who are both recognised by name. The mirasidar has to show that his right is a "customary right legally subsisting."

This presumably involves proof of recognition by the British Government, which, as already indicated, is necessary to establish the right as legally enforceable.

1. (1889) I. L. R. 12 Mad. 422. 2. (1905) I.L.R. 28 Mad. 257=15 M.L.J. 147.
3. (1904) I. L. R. 27 Mad. 386. 4. (1879) I. L. R. 3 B. 452 (at pp. 583 et seq).

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As regards the recognition of mirasi right by the State, the burden of proof undoubtedly rests on appellants: *Vide Secretary of State for India* v. *Bai Rajbai* 1 above quoted.

It may not be out of place to refer to one other point in this connection. If the mirasidars are legally entitled to the right they now claim, it is of course the duty of the Courts to enforce it, irrespective of all considerations of expediency. But where it is clear that the right claimed tends to the prejudice of a purpose to which the property is admittedly dedicated, I think it is the duty of a Court to require very strict proof before giving a decree in its favour. In the present case, no one has ventured to suggest that the enforcement of the mirasidars' claims over nattam would not be gravely prejudicial to the village community generally.

Sankaran Nair, J., freely admits as much, and throws out a suggestion calculated to ameliorate the rigour of mirasi control. He says:—

"It may be that, though the mirasidars are the owners of the village waste lands and house sites, that claim is subject to the claim of the labourers and the residents in the village, and that, if the mirasidar happens to turn out a labourer from his homestead they are bound to give him other house sites."

But this liability is not recognised by the mirasidar: and is quite incompatible with his claim not only as put forward in the plaint, but as argued in Court before us. The Board's Standing Order provides a simple procedure whereby any resident of the village can obtain an allotment of vacant "nattam" for the purpose of constructing a homestead. The recognition of the mirasidars' claims would place the entire control of this unoccupied nattam in the hands of a small corporation frequently consisting of two or three individuals (three in the present case) or even a single person. How potent an instrument of oppression this may be needs no demonstration. It is so, even now, when the mirasidars' claim has not been declared by the Courts, and the labouring classes have the support of Government in resisting it. In the latest survey of the condition of the District, Mr. G. A. D. Stuart writes: (section 12)—

"In Ekabhogum villages the mirasidars still use their claim to village site as a weapon against refractory sub-tenants or labourers, in the manner described by Mr. Mullaly in 1890. A typical instance will be found in village No. 15, Kannivakam, in the Chingleput Taluk. Here there are two mirasidars, both absentees, living in Madras. The wet lands are poor and are assessed at Rs. 2 and Rs. 2-8-0, but the resident sub-tenants have to pay Rs. 12 an acre rent to mirasidars.

1. (1915) I. L. R. 39 B. 625=29 M. L. J. 242.

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Their holdings are altered as often as possible so that they have lost all occupancy right. Their houses are mostly built on a piece of patta land and they have to pay rent to mirasidar for each house site. There is plenty of vacant land on the poramboke village site, but the mirasidars have "forbidden" the sub-tenants to build their houses there. I explained to the sub-tenants that the mirasidars have no right to forbid them to use the village site, but they explained that, if they ventured to disobey, their cattle would be impounded. This is a form of oppression which is also mentioned by Mr. Mullaly. In this village all the waste land on which the cattle graze has been taken up and now stands in the patta of the Mirasidar, so that the sub-tenants are entirely in the hands of the mirasidars in this respect."

The recognition of this claim by the Courts would enable mirasidars, wherever they chose to unite, to practically banish from the village any person, who incurred their displeasure and would go far to reduce the labouring classes to the state of serfdom, from which they have been slowly emerging.

I proceed to consider the evidence directly bearing on the existence and nature the mirasidars' rights over "nattam" and the recognition of these rights by Government. Existence and recognition are, of course, different things; but the evidence regarding both has to be dealt with together inasmuch as appellants depend largely on alleged admissions by Government to establish the existence of the rights they claim.

I may say at once that up to a comparatively late period (about 1870) there is very little indeed either in the Exhibits in the case, or in the Mirasi papers to which we have been referred, or in the decisions of the Courts dealing with the point.

The minds of Mr. Place, Mr. Ellis, Sheristadar Sankarayya and Sir Thomas Munro were all concentrated on something entirely different—The question of the rights of the mirasidars in cultivable land. In the last years of the 18th and the first quarter of the 19th century this was a burning question. A reference to the minutes of consultation dated the 8th January 1796 shows that at that time, Government took a very extreme view of the relative position of themselves and the ryots (including mirasidars). They say "Though the inhabitants of each village may, from generation to generation, have cultivated the lands adjoining to it, yet the original compact is not changed by residence: they can establish no more "rights of inheritance in respect to the soils," than tenantry upon an estate in England can establish a right to the land by hereditary residence, although the liberal custom of English landlords has generally given a preference to the ancient inhabitants, where a reasonable rent has been acquiesced

in." "The mirasi inhabitants then bear the same relation as the other inhabitants to Government; and both of them establish by hereditary residence in a village *not a right but a preference* to the cultivation of the soils, the proprietary right to which is exclusively vested in the Circar."

These were the views that Mr. Place, and to some extent Messrs. Ellis and Sankarayya were combating in the memoranda, and reports on which reliance is placed by Mr. Srinivasa Aiyangar: and although it is needless to say that Sir Thomas Munro in 1824 took a much more liberal and enlightened view of the matter yet he was primarily concerned with the difficulties which the advocates of the mirasidars threw in the way of the introduction of the ryotwari system as regards cultivable land. In almost every passage in which these writers refer to waste, they clearly have in mind either land which has been cultivated and abandoned, (seykal karambu) or land which though never cultivated is fit for cultivation or could readily be made so, and to the cultivation of which by some person or other there is no objection on public or communal grounds (annadhi karambu). It has been argued before us that waste lands include all poramboke lands: and no doubt if waste is interpreted in the widest sense as meaning simply, uncultivated, this is so. But in practice "tarisu" (waste) and poramboke are understood to be two different things—as authority for which statement I need go no further than the opening sentences of the referring judgment of Sankaran Nair, J., in this very case. I may however also refer to the foot-note on p. 185 of the Mirasi Papers which gives an exhaustive classification of all sorts of land according to the "Tirapudi" accounts, which were maintained in those early days of the British Raj, and to the very clear and detailed explanation furnished in Ss. 69—71 of the Minutes of the Board of Revenue dated the 5th January 1818 (*vide* pp. 373—4 of the Mirasi Papers.

Wherever either Place, Ellis, Sankarayya, Sir Thomas Munro, the Board of Revenue or Government use the term waste as including poramboke, they are careful to make their meaning clear: *e. g.*, the answers of Ellis and Sankarayya to the second question propounded by the Board (pp. 184 and 219, Mirasi Papers). Mr. Ellis in a single passage (p. 357 *id.*) uses the word "tarisu" in a special and peculiar sense indicating land which is neither annadhi karambu or seykal karambu, but "entirely barren and uncultivable." This "tarisu" he says should like poramboke be deducted totally from the assessable lands of the village. He obviously has in mind such lands as are from their very nature hopeless for cultivation purposes—*e. g.*, stretches of bare rock, which are now usually classed as "Parai poramboke."

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Having cleared such cases out of his way, he proceeds to formulate his proposal regarding the question then at issue—*i. e.*, the treatment of cultivable lands.

I shall deal seriatim with the rare instances in which these early authorities refer to mirasi rights as applicable to poramboke land, including "nattam."

Mr. Place's final report, which has been much quoted by appellants leaves the question entirely untouched. His conclusions in S. 703 and 704 (pp. 68—9, Mirasi Papers) are on the face of it concerned solely with cultivable land capable of paying revenue to the State.

Messrs. Ellis and Sankarayya however writing in and confronted with the question "Does mirasi right extend to waste land ?" do refer to poramboke lands.

Mr. Ellis says (*vide* pp. 184—5, Mirasi Papers) "In the *Terapadi* accounts the lands are distributed according to their several (23) descriptions, either waste or cultivated, and the Mirasidars must enjoy them as thus entered; on the Nattam they must build their houses and nowhere else, they cannot cultivate or appropriate it to any other purpose; in the *poramboke* they have no right to fill up tanks, stop water courses or obstruct roads ; and so in other (24) descriptions of land, Mirasi right is confined to the *use* of these as they exist. No alteration can be made with respect to them by the Mirasidars ; I mean that they have no inherent right to do so, but with the consent of the Sircar any beneficial change in the appropriation of lands may take place, and a correspondent alteration must be made in the *Terapadi* accounts—thus, if part of the *Annadhi karambu* lands be reclaimed, or a road in the *Poramboke* be stopped up and cultivated, the extent must be transferred from this head to that of *Varapet.*"

This seems to me to simply recognise the mirasidars' right of enjoyment of (*e. g.*) nattam for building purposes. It is obviously incompatible with any claim of full ownership; and I do not find anything to support the idea that their right of enjoyment extends to the exclusion of non-mirasidars from nattam which mirasidars do not require for their own personal use.

Sheristadar Sankarayya's answer to the same question is printed at page 219. He lumps all porambokes (including nattam) in with "tarisu" lands and says they are enjoyed either jointly or severally by the mirasidars. Appellants are entitled, I think, to quote this as an authority in support of their claim. The Sheristadar goes further than any one else in his advocacy of mirasi right; but I am not satisfied that we should be justified in treating him as an authority of the first rank : and he does not seem to have been so regarded by his superiors at the time with the exception of Mr. Ellis himself.

How far the Board of Revenue were inclined to admit the mirasidars' rights in nattam is clear from S. 70 of their Minutes dated the 5th January 1818. (*Vide* page 374, Mirasi Papers).

"The *poramboke*, or land incapable of cultivation, consists of rocks, public roads, the beds of rivers, tanks, and water—courses, the public ground in which the bodies of the dead are burnt or interred, the *paracheri* or suburbs of the village, occupied by the huts of Pariah slaves and other outcastes, the lands on which the different village temples stand, and the site of the village itself, called in Tamil the *Nattam*. It is in this last place that the houses of the landlord Meerassidars are invariably to be found; for here, and nowhere else, are they permitted to build their houses. Various other pure tribes, such as Brahmins, weavers, merchants and others, are admitted to dwell in this place, and all therefore who reside in it are not Meerassidars; but all the Meerassidars have houses, or at least sites for their houses, in the *nattam*. Indeed, their title to erect their dwellings on that particular spot, and their right to control the affairs of the village pagoda, and to appropriate the produce of quarries, mines or fisheries are the chief privileges they possess in the *poramboke*, which, as here described, being incapable of being cultivated, is not liable to any tax."

The right now claimed certainly cannot be read into the privileges herein enumerated. They are stated to have a right of control over the affairs of the village pagoda, but not over the nattam. The latter is expressly stated not to be in their exclusive occupation. They are stated to have a right to erect their dwellings on that particular spot, to which might fairly be added as an inferential corollary "in preference to other people;" but there is nothing to suggest a right to exclude others from portions of the nattam not required for their own use.

These are the views of the Board of Revenue and I can find nothing to indicate that Government, still less the Directors, ever troubled their heads about the matter. There is a single passage in the Minutes of Consultation, dated the 11th February 1856 (page 534, Mirasi Papers) in which Government remarks that Mr. Ellis shows that "the mirasi interest in land of different descriptions varies much—the highest degree of it being found in the case of the Varapat and cultivable waste *the lowest in the poramboke*." I shall show later the utmost limit claimed for mirasi rights in cultivable waste do not extend to the policy of the dog in the manger which it is now sought to put in force as regards "nattam."

Sir Thomas Munro in his famous Minute of 1824, of course, took a very strong view against the mirasi claims in cultivable waste: but he does not touch on the subject of the mirasidars' interests in nattam

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though it is not difficult to see what his views would have been, had he bad occasion to express them.

In the whole of these official reports, minutes and proceedings up to 1870 on the mirasi question, I can find nothing amounting to a recognition on the part of Government of any title in the mirasidars to monopoly or exclusive control of the nattam. The views expressed on other mirasi incidents, which I shall come to later, certainly incline one to the opinion that had the claim been brought to their notice, they would *not* have recognised it. The most that can possibly be said is that there is no record of any repudiation of it; and whether this amounts to much or little depends largely on the practice actually obtaining in the villages. This brings us to the papers connected with the order of Government, dated 16—12—1872 at which time the question first really came up for consideration. I shall return later to a few isolated instances in which specific disputes as to nattam had come before the Courts, the Board or Government previously. They do not seem to me very helpful.

The order of Government No. 1684,* dated 16—12—1872 has been strongly relied on by appellants, and is undoubtedly a piece of evidence entitled to very serious consideration. In the course of it, the Government remark "In purely mirasi villages, where the entire area belongs to the mirasidars, the Gramanattam no doubt appertains to them equally with the other porambokes;" and the Board of Revenue is instructed to exempt Zemindari and mirasi villages and villages which are private property from the rules they were about to formulate regulating the grant of nattam land for house site. An excepting clause was actually introduced accordingly in the Board's Standing Order and was not removed till 14 years later. These proceedings, according to appellants, constituted a distinct recognition by Government of the right for which they are now contending, and are, as their learned Vakil would put it, conclusive of the case.

A careful examination of the connected papers appears to me to considerably reduce the importance to be attached to this alleged recognition. It appears that in 1870 the question of the practice obtaining regarding the disposal of nattam land by Revenue Officers was brought to the notice of the Board of Revenue on a reference from the Coimbatore District. Reports were called for from all Collectors and these are summarised in the Board's Proceedings. For our purpose it is most important to note that it appears that in Chingleput nattam land was granted to *all* applicants on a fixed scale. This scale doubtless refers to the extent allotted, and strongly suggests that in this respect regard was paid to

* See Appendix A.

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whether the applicant was a pattadar or not, and to the assessment paid by him. This distinction is embodied in the existing rules (vide Board's Standing Order 21), and has probably always been observed, wherever rules have been formulated. But there is no mention in Chingleput of any preference to pattadars, as in the adjoining districts of South and North Arcot; and it can only be understood that the village or Revenue Officers granted nattam land for house sites to all applicants at their discretion subject to this fixed scale without reference to any special claim of the mirasidars as such. The Board of Revenue proceeds to consider these reports and to formulate and submit for the approval of Government certain general rules applicable throughout the Presidency. It would appear that in some parts at any rate Revenue Officers had been unduly and unnecessarily interfering in Gramanattam questions; and that it had become desirable to reduce this interference to proper limits. The Board remarks:

"The true view of the case is that Gramanattam is the communal property of the villagers, and that the Collector can only interfere with a view to benefit the community, and when his action is consistent with the common law." Much stress is naturally laid by the appellants on the phrase "communal property." It was at once repudiated by Government, who in their order substitute the following definition:—

"By immemorial usage a portion of every village is assigned rent-free as a site for the dwellings of the villagers, but as the old Hukumnamahs show the enjoyment of it is subject to regulation by the Government."

As a matter of fact, it is clear that the difference between the Board and Government, was merely one of words. The action which the Board proposed for its officers as "consistent with the common law" involved precisely the same powers as Government claim at the present day. Its proposed Rule I runs:—

"Unclaimed portions of the village site may be granted to any one resident or about to become resident in the village on a fixed scale, which must be laid down by the Collector of each district once for all."

Government approved of this; and added a more drastic provision insisting on the land being built on within a fixed time.

So far the papers are not only useless to appellants, but tell very strongly against them on the most important point of the custom, which had previously been obtaining. But in generally approving the Board's proposals, Government, as already stated, went out of its way to place mirasi villages on a separate footing. Why they did so it is impossible to say. The special case of mirasi villages was not raised

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by the Board, and it does not appear that any special representations had been made by mirasidars. If it is to be taken as meaning that in a mirasi village the entire area belongs to the mirasidars, this view is so utterly opposed to every pronouncement of Government before and since that it is difficult to treat this isolated dictum unsupported by any reason as a considered and binding expression of policy. If it is merely meant, that the mirasidars had rights in nattam just as they had in other porambokes, each after its kind, this is in accordance with S. 69 of the Board of Revenue's Minutes of 5-1-1818 already alluded to; but it does not necessarily involve the idea of *exclusive* rights. Practically all that one can say is that in 1872 Government declined to sanction the application to mirasi villages of the village site rules approved for non-mirasi villages; and that if the mirasi claim now under consideration had been placed before Government as then constituted it might or might not have been recognised in full, but it would in all probability have received favourable consideration and recognition to some extent at least. Government issued no specific orders regarding nattams in mirasi villages: but it is very doubtful whether they meant to abdicate entirely the control which had, on the very papers before them, been exercised up till then, so far as appears without objection.

At any rate less than three years later when Chingleput District was settled, the Settlement Register of this very village (Exhibit F) which must be taken as issued by the authority of Government contains a note with regard to building site (nattam) that "no new enclosure is to be made or new building erected without permission in future." It is difficult to reconcile this with the view which the learned Vakil put forward regarding the order of 1872.

I may mention here that although the purport of the latter order was, as already stated, embodied in the Board's Standing Order, yet it does not appear to have attracted the attention of the parties interested or to have had any practical effect on the situation. (Vide Section 8 of Board's Proceedings, 362, dated 24—6—1890, referred to below.)

The next landmark is 1886, when the whole question in much the same form as that in which it now presents itself came before the Board of Revenue in connection with an appeal presented by the mirasidars of Nemelicheri against a certain order of Mr. C. A. Galton, then Collector of Chingleput. The Board says in its Resolution No. 1547, dated 7-7-1886: "This is an appeal which raises the question of the right of mirasidars (in Chingleput) to the ownership and the full control of the Gramanattam or village site. It appears that the mirasidars of Nemelicheri asserted this right over the land in the

parachery of their village and did so by ploughing up part of it, by erecting huts without the permission of anybody and by ousting a pariah who had occupied a house in the parachery for forty years. In their petition the mirasidars assert an absolute right of property in the parachery land or "cheri nattam" and a right to oust their farm labourers or apparently any pariah from it.

2. The evidence they have produced make it certain that they have claimed, and probable (but only probable) that they have possessed this right in past times but they cannot show that it has ever been admitted by Government."

The Board dismissed the mirasidar's appeal, but in view of the importance of the subject, reported the whole matter to Government, drawing particular attention to the G. O. of 1872, and the probability of a civil suit following on the dismissal of the appeal. The Board expressed a strong opinion that the Collector must be supported in asserting the right of Government to deal with the nattam and negativing the claim of the mirasidars to exercise right of ownership over any part of it.

Government, having had the matter thus placed fairly and squarely before them, simply recorded the papers, from which it can only be inferred that they agreed with the Board and were prepared to face the threatened suit. Had they taken a different view, they would certainly have issued orders to admit the Mirasidars' claim, and so save litigation. No suit was apparently ever filed.

These papers clearly show that, whatever view the Government of 1872 might have been induced to take, the Government of 1886 did not recognise the mirasidars' claim.

The next batch of records to which our attention is drawn is that connected with G. O. No. 704, Rev., dated 3—9—1890. In this order Government in the most explicit terms declines to recognise the mirasidars' special claim to nattam, and repudiates the view which it seemed to have taken in 1872. The G. O. says:

"It is true that in 1872 the Government declared that in the exceptional case of purely mirasi villages, where the entire area belonged to the mirasidars, the village site would also appertain to the same body, but the opinion expressed was stronger in appearance than in reality, for it formed part of an argument, contesting the view of the Board that village site was the communal property of the villages and did not appertain to Government. In any case His Excellency the Governor in Council is not now prepared to subscribe to the above dictum, and it is observed that when in 1886, the Board challenged the correctness of the order of 1872 the Government allowed the challenge to pass unnoticed. The said order has thus practically become a dead letter, in so far as it acknowledges the claims of mirasi-

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dars to village sites, and in the revised edition of the Standing Orders the words "mirasi villages" have been omitted from Standing Order No. 37 (formerly No. 39)."

It has been argued before us that the "*double entry system*" regarding house site which prevailed in the village accounts of some, but not all, of the villages of the Chingleput District is itself evidence of recognition of the mirasidars' claim. This matter is fully considered by the Board and Government in these papers. I have no hesitation whatever in rejecting this argument. There is nothing to contradict Mr. Mullaly's statement that the practice was unauthorised by Government or any responsible officer and it was discontinued, as soon as it was brought to notice, and attention drawn to the fact that it might be construed into an admission of the mirasi claim. In the second place the practice itself is probably due largely, as suggested by Mr. Lee Warner, to the grant by mirasidars of house sites to their labourers out of their own "porumanais." (Vide Section 5 of the Board's Proceedings No. 362, dated 24—6—1890). Now the rights of the mirasidars in these porumanais may stand on a very different footing to the right they now claim over vacant nattam. Although the porumanais may be originally misappropriations of nattam poramboke, the mirasidars may have acquired by prescription a valid title to them.

The whole question of the position of pariah and low caste labourers in Chingleput, and their oppression by the mirasidars came before the Board and Government in 1892, in consequence of a memorandum prepared by Mr. Tremenhere, who was then Collector. The views then expressed by both authorities were to some extent influenced by the desire to point out what they regarded as the exaggerated expressions of Mr. Tremenhere: but I can find nothing in either Board's Proceedings 584 A dated 19—8—1892 or G. O. 1010 and 1010-A. Rev. dated 30—9—1892 to indicate a change in the opinions and policy enunciated two years before. Government in fact reiterated its orders regarding the contesting of any civil suit brought to assert the mirasi claim to village site.

The latest orders quoted are those passed on Mr. G. A. D. Stuart's re-settlement report in 1909. These also indicate no change of view. Both Mr. Stuart and the Board emphasize the fact that the mirasidars' claim to all vacant nattam and to the power to oust any non-mirasidar (as now contended for) must be resisted : and Government apparently acquiesce although willing to transfer to "assessed" all poramanais in which a prescriptive title as against Government can be proved or fairly presumed. The above appear to be the only cases in which the abstract question of the mirasi right now in dispute has been considered : and it seems to me that with the exception of the

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order of 1872 there is nothing that could possibly be construed as recognition by Government For reasons given above I do not think this isolated pronouncement is of a nature to be treated as conclusive on the point.

It remains to consider certain cases in which the action of Government is represented as constituting (or at any rate supporting the idea of) recognition of the contested right and certain cases in which the latter is said to have come before the courts, and been the subject of adjudication.

Mr. Srinivasa Aiyangar has drawn our attentien to a series of papers (Mirasi Papers, Nos. 25 to 32) dealing with the payment of compensation by Government for certain waste lands in the mirasi village of Tondiarpet about the year 1810. There is nothing to indicate that any of these lands were nattam or indeed any kind of poramboke: and the fact that Government were prepared to pay compensation to the mirasidars for cultivable waste has no significance in the present connection. Whether such a claim would be admitted at the present day may be doubtful, but the papers make it clear that Government were not prepared to recognise any proprietary right on the part of the mirasidars but only what is referred to as "occupancy" right—by which I think is meant the preferential right of the mirasidar to take up and cultivate waste land (vide p. 143), and that there was an inclination to show some special indulgence to the Tondiarpet mirasidars, because they had recently been evicted from their village in favour of certain Shanars, and thus prevented from exercising their preferential rights. I can find nothing in these papers bearing directly on the present question and I do not think we have been referred to any case in which compensation had been paid by Government for the acquisition of unoccupied nattam.

The general question of the necessity of paying compensation to mirasidars for waste land taken up by Government was again agitated about the year 1856 (vide Mirasi Papers, Nos. XCII and XCV etc.), but here also only with reference to cultivable lands. The two papers mentioned however throw a great deal of light on the views prevailing at the time : and section 39 of the Government despatach to the Court of Directors dated 5—6—1857 (M. P. No. XCV) makes it quite clear that they were only prepared to pay compensation for cultivable waste on the basis of the value of mirasidars' preferential right to take up the land. For the orders of the Court of Directors as to the limitations on this preferential right vide, section 30 of their despatch dated 17—12—1856 (Mirasi Papers, No. XCIV).

It is unfortunate that the reply of the Court of Directors to the despatch of the Government of Madras is not on record.

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Since that time (1856) there seems to have been no discussion so far as the record goes of the liability of Government to pay compensation for waste lands taken up in mirasi villages. The only actual cases to which we are referred are two which came into court. The first which will be referred to later as the *Vyasarpadi* case related to waste land, which at the time of acquisition, though not assigned by Government, was in the actual occupation and enjoyment of a man claiming under the mirasidars. The second, reported in *Sivanatha Naicken* v. *Nattu Ranga Chari* [1], seems to be good authority for the proposition that in the case of immemorial waste compensation is *not* claimable by the mirasidars. It is argued that the decision proceeded solely on the facts of the particular case, but the first two sentences of section 3 of the judgment certainly seem to me of general application.

One specific case referred to in the papers of 1856 has been referred to and relied on by appellant's Vakil. It is dealt with in M. P. No. XCIII and also in Section 37 of No. XCV: and although it arose in the Tanjore District it calls for comment. The case is a curious one. It relates to a plot of land classed as *threshing floor* poramboke in the village of Mamalore. The village was held by 4 sharers who called themselves mirasidars;and these sharers had divided the threshing floor poramboke among themselves. One of the mirasidars Cangappa Naik allowed one Narayanasami to put up a temporary house on 18 gulies of his (Rangappa's) share of the threshing floor and this Narayanasami not only declined to quit when called on to do so, but obtained a grant of 40 gulies more of the same land from the Collector, and appropriated a further extent of 42 gulies in which he was subsequently confirmed by that officer. Rangappa having failed to obtain redress through the Civil Courts resorted to the Revenue authorities: and both the Collector and the Board declined to interfere on the ground that the land was poramboke which Government could give to whomsoever they pleased. Government dissented from this view, and directed that the 82 gulies should be placed in possession of Rangappa, and that as regards the original 18 gulies, they should be entered in the accounts as his land, but he should be left to the ordinary legal means to oust the occupant.

There is no doubt that in this case Rangappa Naik had a genuine grievance. The land was set apart for use as "threshing floor," and the Collector had no right to assign any portion of it to Narayanasami. This, as Government pointed out in S. 39 (p. 555), could only be done if it had ceased to be required for the special purpose for which it was assigned: and in that case it would come under the same footing as

1. (1903) I. L. R. 26 M. 371.

ordinary waste, and the mirasidar would have a preferential claim to it. There is no doubt that Government at the present day would come to the same decision as Government did then, as regards cancelling the orders passed by the Collector. For the rest, the letter of Government undoubtedly contains passages which suggest that they saw no objection to the partition of the poramboke between the mirasidars, and regarded his share as his mirasi land which he could do as he liked.

Appellants may fairly quote these in their favour; on the other hand it is possible that Government in its desire to refute the Board's argument as to the absolute right of Government in poramboke went too far in the other direction. I am not inclined myself to treat these expressions, possibly incautiously used in an isolated case as good evidence of the determination of the Government of that day to recognise the mirasidars' private and complete title in poramboke lands: especially as we do not know what view the Directors took on this reference. It would appear from another despatch of the Court of Directors about the same time (M. P. No. XCIV) that they did not at all approve of the views of Government regarding mirasi claims to waste lands and were much more in accord with those expressed by the Board of Revenue.

Turning to the cases on the subject, the earliest to which our attention was drawn is a very old case decided by Sir Thomas Strange, Chief Justice of the Supreme Court in 1808 (No. XXIV of the Mirasi Papers). This was a suit in ejectment brought by a person as the lessee of certain Vellalars, who claimed to be the ancient mirasidars of Tondiarpet. The defendants were certain Gramanis who according to the plaint were mere Porakudis under the Vellalar mirasidar. Plaintiff alleged an ouster of his lessors by defendants in 1794 and alleged that his lessors had been driven out of the village altogether by the Gramanis with the sanction of the Collector: and the suit was brought to eject the defendants. Neither the Collector nor the Government was a party: and no attempt was made by defendants to justify the alleged ouster of the Vellalars, which the Court was inclined to regard as having been effected by the Collector's orders in consequence of the Vellalars' oppression of the Gramanis. The defence raised was that the Gramanis themselves were the mirasidars: but this was found against them. The only other question gone into by the Court was whether defendants were at the time of suit in possession of anything belonging to plaintiff's lessors, the Vellalars. It was found that they were not: and the suit was dismissed. It will be seen from the above how little bearing the case can

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have on the point now under consideration. The property from which forcible ejectment of the Vellalars by defendants was alleged was the "Nattam" (*vide* S. 6 of the Judgment): and this for a very obvious reason. This was the only part of the village of which they (the Vellalars) held actual possession. The cultivated lands were all cultivated by the Gramanis under them: so that there could be no ouster in regard to them. (*Vide* S. 2 of the Judgment). And by the nattam can only be meant the house sites actually occupied by the Vellalars at the time of the ouster. This is clear from S. 37, where in the learned Judge says, "Shall we say the Nattam? It is in evidence that the persons whom they represent took possession of it for a short time, immediately after the ouster; but it is proved, on the part of the lessors of the plaintiffs themselves to have been long since destroyed, the houses to have been pulled down, and the site of them to be now uninhabited."

The question with which we are concerned never, in fact, came under consideration in that case at all. There is an interesting discussion in the Judgment on the nature and extent of Mirasi rights generally, but it does not help us. Appellants rely on a remark in S. 16 that "the Nattam in which they lived including its adjoining backyards" was a material portion of the mirasidars' rights. I take this to mean simply the nattam which they actually occupied. If it meant the entire area of land set apart for building purposes, the reference to backyards (always part of the nattam) is meaningless.

Two decisions of the Sudder Court have been relied on: Those in Special Appeal Suit No. 108 of 1844 printed at page 486 of the Mirasi Papers and in Special Appeal No. 14 of 1849 (Decision of the Court of Sudder Udalut, Vol. I, page, 119). In neither of these was Government represented and neither is of any real assistance. In the first, which arose from Tanjore, the only question appears to have been the right of a mirasidar to evict a former porakudi from samudayam land which he (the mirasidar) had originally given him to build a house. The second is from North Arcot District and clearly relates to cultivable land. It has nothing to do with house-site: and the general remarks in paragraph 7 of the Judgment are of an *obiter* nature.

Exhibit N is a judgment of the District Munsif of Tiruvellore in O. S. No. 33 of 1894, in which the sole mirasidar of Kathurvedu successfully sued Government for a declaration of his title to 3-32 acres of nattam land in that village. The decision is of course only evidence of one instance of successful assertion of the mirasidars' claim. Stress is laid on the fact that Government did not appeal against the decision: but this is explained by the fact that the plaintiff

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had clearly proved a good title against Government by 60 years adverse possession, while the right of Government to charge assessment was recognised by the Court. Government had therefore no case to appeal on.

Lastly much reliance was placed on an unreported judgment of Turner, C. J., in C. S. No. 128 of 1882.* In that case plaintiff, a vendee, from the mirasidars, sued for recovery of 5 acres and odd of waste land on which he had built a house and made a garden. The defendant was Government, who had ousted him, claiming the land as their own. It was found that plaintiff had a good title to the land, and, by consent, he was given a decree for damages in place of recovery of the land.

The land in dispute lay within Madras Municipal limits, but there is absolutely nothing to suggest that it was village site (nattam). The very size of the plot is against such a suggestion: for in nattam land 5 acres would under the Government system suffice for 50 house sites on the most liberal scale. The words nattam or house site are never mentioned in the pleadings or judgment: and the reasoning of the learned Judge proceeds entirely on the assumption that it is waste land liable to pay assessment to Government on occupation. He decides that mirasidars have certain property in the waste, and that property enables them to dispose of the occupancy of the lands subject of course to the payment of land revenue. This is a very important pronouncement, but it has no immediate bearing on the present question: and the case is not, as was argued, a direct authority on it.

I have above to the best of my ability summarised and considered the evidence cited as bearing directly on the right now in dispute. There is other evidence with which it is unnecessary to deal, e. g., various ancient sale deeds in which mirasidars have professed to transfer proprietary rights in nattam and other poramboke lands. These, at most, amount to assertions of the right: and I am very far from suggesting that the right now claimed is a modern invention. On the contrary I have no doubt it is an ancient claim which the mirasidars have asserted sometimes successfully, at the expense of the labouring classes in their villages—sometimes through the medium of the Courts, more frequently by force, and the exercise of the influence and dread attaching to their status. But the real question is whether this right has ever been recognised by Government, or declared by the Courts in such a way as to bind Government or to establish it for the purpose of the present reference: and this I do not consider to be proved by the direct evidence dealt with above.

* See supra, p. 18.

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It only remains to determine how far this direct evidence is strengthened, or plaintiffs' case rendered more probable by the analogy of other rights inherent in the mirasidar.

The nature of the latter is set out in para. supra. Obviously nothing can be deduced from rights (a) and (b). No attempt has been made to show that the mirasidars possess rights over other poramboke lands bearing any analogy to the one in dispute. As regards (e) it is sufficient to quote Mr. Ellis (vide P. 184 M. P.) "In the *Annadhi karambu*, or immemorial waste, though they possess the exclusive right of cutting firewood, working quarries, etc.. they have *no right of cultivation*, much less can they claim any to break up common used for pasturage, or to cut down productive trees, as palmyra, cocoanut trees, etc."

I do not think any argument could be based on this: and there is no evidence, so far as I am aware, to indicate that any such exclusive right has ever been claimed in modern times. There is no trace of anything analogous to it mentioned in Mr. G. A. D. Stuart's very careful and able report (dated 1908) except a claim set up in a few villages to an exclusive right to dig silt and cut grass in tank beds—which he says is not put forward very seriously.

There remain (c) and (d) which may be conveniently dealt with together.

(c) A preferential right to cultivation of all lands which have been brought under, but have gone out of, cultivation (seykal karambu).

(d) The right to certain fees (tunduvaram) on lands granted for cultivation to non-mirasi cultivators.

Now if it were shown that the mirasidars possessed not a mere preferential right to cultivate, arable waste but a right to evict any other person who had taken up such land under engagement with Government, and to appropriate that land for themselves, then it might be argued with some plausibility that they possessed a similar right in the nattam. I say " some plausibility" because even then there would be a very vital difference between the two cases, or, to put it in another way, to render the analogy useful to appellants it would have to be shown that their rights as regards arable waste granted to other persons by Government extended far beyond their largest claims. It has been claimed that where Government has granted waste land on cowle to a non-mirasidar, the mirasidars up to three generations might come forward, take the land from him and cultivate it themselves: but by so doing, it has always been assumed, that they would cultivate it themselves and pay assessment to Government. It has never been suggested that they were entitled to cultivate it free of assessment, or to keep the

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land waste and pay no assessment. Here the claim of the mirasidar to evict the non-mirasidar is coupled with no such liability. No assessment is charged on nattam (except in case of encroachments): and the mirasidars' claim is to evict the non-mirasidar and keep the site unoccupied and useless, until the non-mirasidar is prepared to acquiesce in the mirasidars' terms. This to my mind cuts at the root of any analogy that can be sought to be drawn for the purpose of the present reference.

But, as a fact, I can find no authority in support of any right of recovery by mirasidars of arable waste granted by Government to another person. The Vyasarpadi case to which I have referred goes only to this length—that where the mirasidars have put a non-mirasidar in occupation of cultivable waste, Government cannot evict the latter, though they may (presumably) collect assessment from him. The very same learned Judge has ruled in *Subbaraya* v. *The Sub-Collector of Chingleput* [1] that where the Revenue authorities had granted cultivable land to a non-mirasidar disregarding the preference to which the mirasidars (in spite of a previous relinquishment) were entitled, it was nevertheless, not open to the mirasidars to oust the person admitted by Government. Mr. Srinivasa Aiyangar seeks to dispose of this ruling on the ground that its correctness has been doubted by Shephard, J., in *Secretary of State* v. *Ashtamurti* [2]. That learned Judge was dealing with the conflicting rights of a Jenmi and a tenant in possession: and all he says is "Notwithstanding the opinion expressed by Turner, C. J., in *Subbaraya* v. *The Sub-Collector of Chingleput*,[1] I think it must be allowed that a suit would lie to compel the Collector to settle the assessment with the real owner and not with a third person".

I am not clear what there is in Turner, C. J.'s judgment, which was relied on by defendants before Shephard, J., but I can find no reason for doubting the correctness of the Chief Justice's ruling in the present connection.

There is a Full Bench Case, *Sakkaji Rau* v. *Latchmana Goundan* [3] to which also Turner, C. J., was a party. The actual question before the Full Bench related to the mirasidars' right to "tunduvaram"; but it must be noted that the first prayer of the mirasidar plaintiff had been for recovery of land granted to the defendant by the Revenue authorities: and his relief was refused in the first Court, and the refusal was never appealed against.

This brings us to the subject of "tunduvaram" or swatantrams.

1. (1883) I. L. R. 6 M. 303. 2. (1889) I. L. R. 13 M. 89 at p. 121.
3. (1880) I. L. R. 2 M. 149.

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The right of the mirasidar to collect something from non-mirasidars holding lands directly under Government has undoubtedly been recognised by Government and is so recognised even in the present settlement. The matter is very clearly discussed in Sections 4, 11 and 18 of Mr. Stuart's report. It appears that in the course of Mr. Puckle's settlement in 1875 the value of these fees was found to amount to at two annas in the rupee of the Government assessment, and the amount of swatantrams at this rate was duly entered in the village registers. So far as Government is concerned this matter is concluded: though according to Mr. Stuart (vide S. 11 of his report) the fees are very rarely paid in practice at the present day, and the Courts have held as long ago as 1875 that the right to collect them is not to be taken as a necessary incident of mirasi right, but has to be established by reference to the custom of each village, *Vide Sakkaji Raw* v. *Latchmana Gaundan.*[1] The fees, in fact, seem to be a sort of compensation for the waiving of the mirasidars' preferential right of cultivation and nothing more. Its recognition by Government has no bearing on the present claim relating to nattam poramboke which is exempt from assessment. Even if the analogy were held to be complete, so that the mirasidars could claim from the grantee of a house site from Government a small proportion of the assessment which would be leviable, if the land were "ayan", this would not support the right of eviction now under consideration.

There is one reported case, which has been cited by appellants, but to which I have not hitherto referred as it stands on a footing by itself. This is *Natesa Gramani* v. *Venkatarama Reddi* [2]. The suit was brought by a Zemindar to enforce acceptance of patta by his tenants, who were also mirasidars of that particular village. One question for disposal was his claim to charge for water taken from a pond in poramboke land, as if it was water belonging to Government. The learned Judges accepted the concurrent findings of both the Lower Courts, that in that particular village poramboke and assessed lands are generally the property of the mirasidars, and accordingly held the water not to be Government water. The decision was confined to the particular case and in any event is not binding on Government.

I would answer the reference in the negative.

I need hardly repeat, what I have endeavoured to explain at the outset of my judgment. I have considered the matter in its general aspect whether the right claimed is incidental to the status of mirasidar. We are of course not concerned with cases in which a mirasidar has, prior to the grant by Government, already acquired a title to the particular site either by previous grant or prescription, and sues on

1. (1880) I. L. R. 2. Mad, 303. 2. (1907) I. L. R. 30 Mad. 510.

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such title. Nor am I to be understood as saying that the mirasidars of a particular village are precluded from showing (if they can) that in that village they have acquired by prescription a title in the nattam generally as against Government, which would include the right claimed. But the mere fact that they are the mirasidars of the village neither carries with it such a right, nor does it even raise a presumption of the existence of such a right.

Kumaraswami Sastri, J:—The question referred to us for decision is "whether in a Mirasi village the Mirasidar is entitled to recover possession of a house site held under a patta from Government."

The Chingleput District, in which the Mirasi village in question is situate, is part of what was known as Tondaimandalam where village communities seem to have flourished with some vigour till recent times. A reference to the Mirasi papers and the Chingleput District Manul shows that, under the Hindu Kings, Nattams (villages, formed a close village or township the whole property of which was corporate except probably the actual house site and its backyard in the possession of each villager. On the first formation of a village the rights of occupancy of the whole land comprised in its boundaries seem to have been divided into a number of equal shares or ploughs and allotted to the different members of the settling community. The affairs of the village were not managed by an official appointed by the Sovereign but by the sharers in common. The village or township and not the individual ryot was the Hindu Revenue unit. The village boundaries seem to have been fixed and unalterable. At the earliest stage there seems to have been common cultivation and the net produce, after payment of taxes, was divided according to the shares of the members composing the village community. These villages were known as *Pasankarai.* The lands seem to have been divided periodically but later on were divided once for all, the Mirasidar enjoying the Mirasi in his own cultivated lands without interference by his neighbours and a share in the waste and other lands not brought, under cultivation in proportion to his share in the village. Such villages were known as Aridikarai. Even in such villages, excepting as regards lands appropriated to each Mirasidar, the communistic principle seems to have prevailed. Though at first the sharer was not entitled to sell the land allotted to him without the consent of the other members of the community, the right of alienation was gradually established and the alienee acquired by the sale or mortgage a proportionate claim to all the incidents common to the village, as for instance, the right of taking up waste lands to be brought under cultivation, the right of quarries, fisheries, pasturage and taking timber from forests. When the sharers or Mirasidars were unable to cultivate their lands in person, they had recourse to tenants

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or Payacarries who were called Ulkudies if they resided in the village and Porakudies if they were non-residents. In the beginning the tenants were all tenants at will. The Ulkudies, by reason of long possession, seem to have been recognised as having occupancy rights. The a Pyacarries, whether Ulkudies or Porakudies, paid the Mirasidars a certain proportion of the produce or a certain fixed payment which was known as Swamibhogam or Tunduvaram. The name given to the rights of the sharers was called *Cawnyatchi* when they were non-Brahmans and *Swastium* when they were Brahmans. During the Mahomedan period we find the term "Miras" coming to be used indiscriminately for all such rights.

The lands of every village were divided into (1) lands which the Mirasidars held free of any tax payable to Government which comprised Poramboke or lands incapable of cultivation Tarisu or waste, and (2) those for which taxes had to be paid and which were called either Varapat or Teervapat lands. As regards Tarisu or waste lands they were either Annadi karambu or immemorial waste or sheycal karambu or wastelands which had for some time been cultivated. As soon as either of the kind of waste was cultivated, it was classed as Varapat or Teervapat. That part of the Poramboke was called Gramanattam which was the site of the village itself and was the place where the houses of the Mirasidars were usually built. The Cheri was the site set apart for the houses of Pariahs and other low caste people.

So far as the Sovereign was concerned, he was entitled to a share n the produce which in theory, was one-sixth though in practice it seems to have been a great deal more. The whole village community was liable to pay the tax and, so long as this was done, it does not appear that the State interfered with the cultivation of the lands.

The origin of the rights claimed by Mirasidars is lost in obscurity. I am unable to accept the theory that there was a grant by the Chola King Anandu Chakravarti to the Vellala colonists whom he is supposed to have introduced in Tondaimandalam. There is nothing but bare tradition to support it and, as pointed out by Sir Thomas Munro in his vigorous minute, dated the 31st December, 1824, (page 432 of the Mirasi Papers), the whole story is extremely improbable. The origin of the rights of Mirasidars has to be sought in custom or usage rather than in a royal grant. There can be little doubt that colonists or settlers, who brought lands under cultivation and thus increased the revenues of the State, were looked upon with favour and encouraged: and, where cultivable lands were abundant, the settlers on any particular tract would have had a free hand in expanding their cultivation and would have considered cultivable lands in or near the village as within the exclusive sphere of their influence. They would also have

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had abundant pasture lands for grazing their cattle, and forests for fire wood and timber. So long as the State received its share of the produce raised, the settlers were, in all probability, given a free hand in the management of their internal affairs and encouraged in their enterprise by light assessments. A system, based originally on convenience and expediency, gradually acquired the sanction which use and custom invariably acquire in this country. The Mirasi tenure is, in my opinion, more a customary tenure, whose incidents have to be gathered with reference to the rights actually proved to have been enjoyed by the Mirasidars. So far as the rights of the Government are concerned, the question has not been free from difficulty. As regards the sites on which the houses of the villagers actually stood and the backyards attached thereto and as regards the lands which were actually brought under cultivation and treated as Varapat or Teerwapat there can be little doubt that in course of time they came to be treated as the exclusive property of the villagers which they were at liberty to alienate as they pleased. So far as the waste lands are concerned, there can be little doubt that the villagers treated them as property which was capable of transfer in proportion to the extent of the cultivated land of the transferor but is not shown that the Government acknowledge their absolute rights to the waste lands. I do not think that the records warrant us in coming to any definite conclusion on the question as to whether Hindu and Mahomedan Sovereigns who ruled over the Carnatic recognised the absolute rights of the Mirasidars over waste or that compensation was paid for waste lands. No doubt Sankariah in his reply set out at page 218 of the Mirasi Papers and Mr. Smalley (at page 401) state that mirasi rights were purchased or compensated for when grants were made. There is also a reference to the practice in the report of the Inam Commissioner which is set out in Government Order. No. 2346 Revenue, dated 23rd December 1861. It does not appear that the lands were in those cases waste. It would, in my opinion, be unsafe to draw any general conclusion on the rather meagre materials before us. It, however, appears that, so far at least as the Chingleput District is concerned, Mirasi rights were not interfered with to any serious extent during the Hindu and Mahomedan periods and that the Mirasi system prevailed comparatively unimpaired when the District came under British rule. The following passage from the Minutes of the Board of Revenue, dated 5th January 1818, (page 368 of the Mirasi Papers) is instructive. After setting out the Mirasi tenure with its incidents as they existed when Mirasi rights were in full force they observe as follows :—"It is by no means, however, to be understood that this is the state generally of Mirasi property in the present time. The severe and arbitrary policy of the Mussulman

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princes, which, notwithstanding their short and unstable authority on the other coast of the Peninsula, so materially affected the interests of the landlords both in Canara and Malabar, proved much more detrimental to the Mirasidars of the Tamil country, where their authority was of considerable duration, and their dominion was firmly established under the commanding influence of European power. It is well known that, by successive augmentations, the demand on the Mirasidars of the Carnatic was gradually raised, so as at last very generally to absorb not only the whole of the landlord's rent, but in many places a portion of the farmer's profit also. Most of the Mirasidars in that part of the country were thus reduced to a situation which, except in name, differed little from that of the Oolcoody Payacarries or permanent farmers ; and the Mussulman Government by absorbing the whole landlord's rent, became not only the Sovereigns but the landlords of the country, enforcing in practice their favorite maxim, that the State is the exclusive proprietor of the soil * * * In the Chingleput District also, which was ceded to the Company as a *Jaghire* before the full extent of the arbitrary power and severity of the Mahomedan Government had begun to be felt, as well as in Dindigul, Madura, Trichinopoly and Tinnevelly, the latest of their southern conquests, Meerassy, though greatly reduced in value, was found in a tolerably perfect state". I am unable to accept the contention of Mr. Srinivasa Ayyangar that, when the Chingleput District came into the possession of the East India Company, the Mirasidars were recognised by the State to be the *sole* and absolute owners of the lands included in the boundaries of the village and that the only right the Government then had was to receive the revenue. There can be little doubt that, by long usage and custom, Mirasidars had certain exclusive rights and privileges over waste lands, but it does not follow that the rights of the Sovereign or Lord Paramount of the soil were ever relinquished in favour of the Mirasidars. Even Sankariah, who supports the claims of Mirasidars to waste lands, admits the right of the State to issue cowles for the cultivation of waste lands if the Mirasidars did not cultivate. In dealing with Mirasi rights to waste lands he observes as follows:— "While, however, there is, as has been explained, a right of property to the inhabitants as respects their Mirasu, yet, as this right is founded chiefly on possession, *a paramount right* to the territory, over which his dominion extends, appears to vest in the Prince; if, therefore, the Mirasidar fail to cultivate, and loss thence accrues to the State, the Sircar enjoys and exercises the right to cause the lands to be cultivated and to issue cowles for that purpose." The right of the State to select a person to enjoy the Miras and *to confirm him in possession* by cowle, if the Mirasidar fails to cultivate or acts in any

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manner detrimental to the State, is also recognised by Sankariah and an instance is given were the Tanjore Rajah transferred villages by *Sasanam* to non-Mirasidars. In *Bhaskarappa* v. *The Collector of North Kanara*[1] Mr. Justice West, in dealing with the opinions expressed by Mr. Ellis and the above passage in Sankariah's reply, observes as follows :—"There are many other statements to the like effect, and Sir Thomas Munro was undoubtedly right when he asserted that the Government had always asserted a right of disposal over the waste lands of a village". Though probably Mr. Justice West was not quite accurate in his remarks as to the effect of the replies of Mr. Ellis and Sankariah, supporting the absolute proposition laid down by Sir Thomas Munro, there is very little to support the contention that waste lands, during the Hindu and Mahomedan periods, were treated as the absolute property of the Mirasidars to which the State had no claim except for a share of the produce when the Mirasidars chose to cultivate. They seem to have been the subject of reciprocal rights and obligations.

Whatever may have been the rights claimed by or granted to the Mirasidars during the Hindu and Mahomedan periods, the real question is as to the rights which were in existence when the East India Company acquired the territories of the Nawab and the extent to which those rights were acknowledged by the British Government. The antecession rights would only be effective in so far as the British Government consented to their continuance after having become the Sovereign rulers of the Carnatic. As observed by their Lordships of the Privy Council in *The Secretary of State for India in Council v. Bai Rajbai* [2] the relation in which the landholders stood to their Native Sovereigns before the cession of territory and the legal rights they enjoyed under them are only relevant in considering what rights the new Sovereign recognised, either by agreement express or implied or by legislation. In the words of Their Lordships "the implied agreement may be proved by circumstantial evidence, such as that mode of dealing with them which the new Sovereign adopted, his recognition of the old rights and the express or implied election to respect them and to be bound by them."

The question under reference has, therefore, to be decided with reference to the reports of the various officers as to the nature and extent of the Mirasi tenure, the orders of Government on such reports, and the decisions of British Courts with reference to the rights of the Mirasidars.

When the East India Company acquired the territories now comprised in the Madras and Chingleput Districts and proceeded to settle

*1. (1879) I. L. R. 3 B. 452. 2. (1915) I. L. R. 39 B. 625=29 M. L. J. 242.

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questions relating to the assessment and collection of revenue, three divergent views seem to have been entertained. One was that the Government were the absolute Lords of the soil and that the persons in possession, though for generations, were only in the position of tenants at will. Another was that the Mirasidar had hereditary property in the soil which was good as against the State and the third was that the Mirasi right was only a preference of cultivation derived from hereditary residence.

When the East India Company assumed direct control and management of the Jaghir, Mr. Place was put in 1794 and continued in office till 1798. He started with the view that the Government were the sole and absolute proprietors of the soil and that the Mirasidar was only entitled to "a preference of cultivation derived from hereditary residence, but subject to the rights of the Government as superior Lords of the soil to do what it chose for the cultivation of the land." Acting on this theory, he seems to have dispossessed several Mirasidars in Tondiarpet, a suburb of Madras, and his action led to a suit in the Supreme Court (to which I shall refer later on) which, though dismissed on a technical ground, was the first judicial recognition of Mirasi rights by the Supreme Court. Further enquiries induced Mr. Place to change his views and to hold that the Mirasidars had undoubted hereditary property in the soil. In the disputes between Mr. Place and the Mirasidars the Board of Revenue and the Government seem to have taken different views (see pages 25 to 38 of the Mirasi papers). Mr. Place was asked to submit a final report and he did so on the 6th June 1799 (page 38 of the Mirasi Papers) where he reported in favour of the rights of the Mirasidars to the property in the soil. Mr. Place defined Mirasi as "a right to the use and substance of the soil vested in the present proprietor, his heirs, and successors, so long as he does or can cultivate it and pays his dues of Government, and is obedient to its authority and that, when he does not or cannot cultivate his lands, when he withholds the dues of Government or is disobedient to its authority, such part as he *neglects* or in the latter case the whole *escheats* to Government who may confer it on whom it pleases". In 1806 a claim for compensation was made by certain Mirasidars of Tondiarpet in respect of lands taken up for digging what was known as Clive's Canal. The Board of Revenue in their minute dated 1806 offered three pagodas a cawni as compensation and directed the Collector to inform the claimants of the right of Government to make any appropriation of Sircar lands, especially if waste, on commuting the occupancy right as may be possessed. Disputes arose as to the persons entitled to receive the amounts, and, on a claim being made by Messrs. Arbuthnot and Co., the Board, on the 24th December

1810, addressed the Government on the matter. The view taken by the Board was that the lands were of little value and would not have been taken up by Mirasidars if they were assessed and offered to them. They proceeded as follows:—"The refusal, according to the general usage, would have left to Government the option of disposing it in any other manner; for the principle of the absolute property in the soil being vested in the Mirasidars, however suitable to primitive ages and institutions, does not certainly accord with the usage of modern times in those parts of India, more especially as relates to land, which neither is, nor, within the memory of man, has been in a state of cultivation." Mr. Ellis was asked whether the Mirasidars were entitled to any compensation and, if so, to how much. He treated the first question as settled by the decision of the Supreme Court in 1808.

The introduction of the Ryotwari system was authorised by the Court of Directors in their despatch, dated 16th December 1812, and this necessitated enquiries into the various land tenures. On the 2nd August 1814 the Government requested the Board of Revenue to get the opinions of the Collectors on 28 questions framed by the Government as to Mirasi rights. The most important questions were questions 1 to 4 which run as follows:—(1) How has the Mirasi right hitherto been recognised and respected, where Mirasidars were not the renters? (2) Does Mirasi right extend to waste lands? (3) Is Mirasi right forfeited for ever, when cultivation is for a single season discontinued? and (4) Where Mirasi right exists has it always been respected by the officers of Government in framing the Jummabundy?

The replies of Mr. Ellis, who was Collector of Madras, were that the Mirasi right, which he defined as "a general term used to designate a variety of rights, differing in nature and degree, but all more or less connected with the proprietary possession, or usufruct, of the soil, or of its produce" always existed within the boundaries of the Supreme Court's jurisdiction, that it extended to waste lands, that it was not forfeited by non-cultivation or abandonment, unless the period extended to over three generations, and that it was always respected in the villages of Madras. In answer to the question as to whether:—" Mirasi right extended to waste lands, his reply was as follows:—Mirasi right, wherever it exists, extends certainly to waste land, but then the right is limited by the nature of the waste; the extent, entered in the *Terapadi* accounts under the head of a sheycal-karambu, or cultivable waste, they hold as they do the general Varapat, or the taxable lands of the village, and may cultivate it whenever their means permit or rent it to Paracudis but in the Annadikarambu, or immemorial

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waste, though they possess the exclusive right of cutting firewood; working quarries etc. they have *no right of cultivation*, much less can they claim any to break up common used for pasturage, or to cut down productive trees, as palmyra, cocoanut trees etc. In the Terapodi accounts the lands are distributed according to their several descriptions, either waste or cultivated, and the Mirasidars must enjoy them as thus entered; on the Nattam they must build their houses and nowhere else, they cannot cultivate or appropriate it to any other purpose; in the Poramboke they have no right to fill up tanks, stop water courses, or obstruct roads; and so in other descriptions of land, Mirasi right is confined to the *use* of these as they exist. No alteration can be made with respect to them by the Mirasidars; I mean that they have no inherent right to do so, but with the consent of the Sircar any beneficial change in the appropriation of lands may take place, and a corresponding alteration must be made in the Terapadi accounts—thus, if part of the Annadi-karambu lands be reclaimed, or a road in the Poramboke be stopped up and cultivated, the extent must be transferred from this head to that of Varapet."

As regards the forfeiture of rights, he was of opinion that the Mirasidar was, by implied contract, bound to cultivate his full proportion of the Varapet lands, according to the share he held in the village and that the Government could arrange for cultivation. If he failed to do so, he was of opinion that the State could emp y Payacaris for a fixed term, not an indefinite number of years, and n extreme cases could resume his Mirasi Swatantrams in respect o he land he refused to cultivate.

I have already set out the reply of Sankariah on the question relating to waste. His view is that, as the waste lands are included in the Grama Taram, all such lands have been considered to appertain exclusively to Mirasidars.

Mr. Peter, the Collector of Madura, was of opinion that the Mirasi right extends to waste lands and that, if they are brought under cultivation even by a renter, the Mirasidar is entitled to his share. Mr. J. Cotton, the Collector of Tinnevelly, was of opinion that Mirasi right, wherever it exists, extends to waste lands. Some Collectors did not however go so far.

In 1817 the Board of Revenue had under consideration a scheme for permanently assessing each field in each village with money rent for the purpose of introducing the Ryotwari system and wanted information as to the rights of Mirasidars. Mr. Ellis considered the question as to what arrangement was to be made in respect of waste lands and he proposed to transfer the waste lands to the Mirasidars

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(page 358 of the Mirasi Papers). The Board of Revenue in Proceedings, dated the 24th July 1817, passed no final orders on Mr. Ellis' proposals but reserved the subject for future consideration. On 8th September 1817 the Board of Revenue sent to the Government a proposal for the introduction of the Ryotwari system and observed that the Board intended to preserve the rights of the Mirasidars by directing Collectors not to enter into agreements with persons, who are not, by hereditary or prescriptive right, entitled to pay their dues directly to the Sircar. The Government on the 16th December 1817, in reply to the Board of Revenue, stated that the Ryotwari Settlement should not be attended with any infraction of the rights of Mirasidars or others in the soil (page 365 of the Mirasi Papers). In 1818 the Board of Revenue recorded a minute on the different modes of Revenue Settlement existing in the Madras Presidency. In dealing with the Tamil country they observe that "In every Tamil village the exclusive right to the hereditary possession and usufruct of the several descriptions of lands situated within its boundaries was originally vested in the Vellalars, one of the principal Soodra castes of that nation, by whom it is termed cawnyatchi, or free hereditary property in the land." As regards waste lands, they observe as follows:—"The Tarisee, or waste land, is subdivided into the Annadi karumboo, or immemorial waste, and the Sheycal karumbu, or waste land that has at some time been cultivated; each of these consists chiefly of tracts of common on which the Mirasidars graze the cattle employed by them in agriculture, or of jungle, in which they cut the firewood used by them for fuel, and both are held free from tax. Should the Mirasidars, however, possess the means, they are vested with ample right to extend their cultivation to these lands, though it is understood that the consent of Government is necessary before they can break up the Annadi karumbu, or land that has never been under the plough; but the moment any part of either the Sheycal or Annadi karumbu is reclaimed, the nature of the land is changed, it ceases to be Tarisee or waste, and no sooner is it converted into cultivated land than it is transferred, as such, in the village accounts, to the head of Waraput or Teerwaput, and in common with all land of that description becomes, for the plain reasons already given, liable to tax."

On the 4th November 1820 Mr. Smalley, Collector of Chingleput, addressed the Board of Revenue on the introduction of the proposed Ryotwari Settlement into his District. His proposal was that a fixed Toondooteerva of 3½ per cent on the gross rent should be allowed to the Mirasidars, as it was about the average Toondoowaram which the Mirasidars in that District were then receiving from the Payacarries. As regards waste land, he fully admitted the Mirasidar's right to

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it, if the Mirasidar was able to bring it under cultivation: but in cases where he refused or was unable to cultivate, he proposed that the Government should let it to strangers reserving the right of the Mirasidar to come in at any period within 105 years on paying the assessment to the person whom he wants to dispossess. The period of 105 years seems to have been the period of limitation in vogue according to Hindu notions which fixed three generations as the period after which rights lapsed.

On the 4th December 1820 the Board of Revenue passed proceedings on a reference by Mr. Hyde, Collector of South Arcot, as to the Settlement of that District. They observed that, though much had been said about Mirasi rights in the Southern Provinces, it was doubtful when and how those rights originated, what they exactly were, and whether any Native Government ever admitted them to the extent claimed. As regards waste land they observe as follows:—"The Mirasidar has also an interest in the waste land, and a right to a *Merah* or fee, when, being unable to cultivate himself, he gets a tenant who shall cultivate it, and pay the usual rent to Government. This is fair; he has his fee for the service he performs; but if the Mirasidar neglects or refuses to get a tenant for the waste, and the Sircar is obliged to find one himself, to keep up or increase the revenue of the village, the Mirasidar has no right to the fee; it may either be added to the rent payable by the tenant, or may be given up to him as an encouragement to him to extend the cultivation. The Mirasidars may have claimed more than is here allowed them, and more may have been occasionally granted to them. The Government has been, and ought always to be, indulgent towards its ryots; but when we come to discuss the principle, it will be found that any further legal extension of the privilege of Mirasidars, particularly in the case of their neglecting to keep up the cultivation and revenue of the village, is contrary to common sense, and those common principles upon which every Government and society is founded." In dealing with the letter of Mr. Smalley, already referred to, the Board stated that they concurred generally in the opinions expressed by Mr. Smalley as regards waste and furnished him with an extract of their Proceedings, dated 4th December 1820, above referred to, on Mr. Hyde's report.

It appears from the Mirasi Papers (page 419) that the Government approved of these Proceedings on the 23rd February 1821.

On the 8th August 1824 the Court of Directors addressed a Despatch regarding the Board's Proceedings, dated 4th December 1820 where they observe as follows:—"The right of the Mirasidars to the lands which they themselves cultivate is in general indisputable, as

is very often, also, their right to certain advantages accruing to them, apparently, as descendants of the head men of the villages. Their right, in any case, to limit the property of the Oolcoody ryots in their permanent hereditary possessions, seems much more doubtful, and being hostile to the prosperity of the community, ought not to be allowed except upon unquestionable evidence in each case."

On the 2nd January 1822 the Court of Directors were of opinion that the question of Mirasidars' rights ought not to be decided solely on the view which Mr. Ellis happened to entertain but should be decided after deliberate inquiry and full information.

On the 14th April 1823 the Board of Revenue passed Proceedings on Mr. Smalley's report regarding the introduction of Ryotwari Settlement in Chingleput. They authorised the Collector to give lands to others when the Mirasidars refused to cultivate and stated that the persons to whom the lands were given were not liable to be ousted but be confirmed in the possession of the land so long as they continued regularly to pay the rent.

In 1823 the Board of Revenue passed proceedings after they received the Minute of the Court of Directors dated 2nd January 1822. As regards waste land they observe "It has been stated in the replies from Madras, Tinnevelly and Madura, that the right of the Mirasidars extends to 'waste lands,' but what this right is, has not been particularly defined. The Collector of Madras observes that though the Mirasidars 'possess the exclusive right of cutting firewood, working quarries etc., they have no right of cultivation, much less can they claim any to break up common used for pasturage or cut down productive trees, as palmyra, cocoanut etc.' It is also stated that 'the consent of the Sircar' is necessary towards any beneficial change being made with the appropriation of the lands. It appears from the above that the Sircar has a right in these lands as well as the Mirasidars. and the Board have now in view to ascertain whether the Government can, according to the ancient usage of the country, appropriate waste land for public purposes without making any compensation to the Mirasidars, further perhaps than the usual one which may be thought just and proper to make up for any loss they may sustain from being deprived of the usage of common for their cattle, firewood etc." The Board proposed to address the different Collectors as to whether the former Governments had the right to take up waste lands without paying compensation to Mirasidars and whether in granting Inams compensation was paid to Mirasidars. The Government, however, passed no orders on these proceedings and no question was circulated.

On the 31st December 1824 Sir Thomas Munro wrote his famous Minute on the state of the country, and condition of the people. His

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view was that the Mirasidar, when he failed to cultivate, lost all interest in the property and that the Government may give it to whomsoever it pleases. As regards waste land he observes "Mr. Ellis does not seem to be very decided as to the nature of the property enjoyed by the Mirasidar in waste. He admits that he cannot break it up without the permission of the Sircar. He does not say that he has any specific share of it, or that he can sell it alone without the cultivated land, or that he can do more than sell with his arable his right of common in the waste. The Sircar from ancient times has everywhere, even in Arcot as well as in other provinces, granted waste in Enam free of every rent or claim, public or private, and appears in all such grants to have considered the *waste as being exclusively its own property.* * * * * *

* * It has been supposed that in Meeras villages in Arcot, in the original compact between the Circar and the first settlers, the exclusive use of the waste was secured to those settlers: but it has already been shown, that in all villages, whether Meeras or not, the inhabitants reserve to themselves the exclusive use of the waste. But this right is good only against strangers, not against the Circar, which possesses, I think, by the usage of the country, *the absolute right of disposing of the waste as it pleases,* in villages which are Meeras as well as in those which are not."

These views represent, what I may call, the extreme views as to the Crown's prerogative and they do not seem to have been subsequently accepted in their entirety either by the Madras Government or by the Court of Directors.

In 1839 the Collector of Chingleput addressed the Board of Revenue with reference to the rights of the Mirasidars in the whole of the lands within the village boundaries, and as to whether the Mirasidars had authority to sell the Poramboke and immemorial waste lands. His view was that the rights of the Mirasidars over the Poramboke and Annadi waste extended only to the privilege of grazing their cattle on them when waste and receiving the Coopatums when cultivated.

On the 15th August 1839 the Board of Revenue passed proceedings to the effect that the Mirasidars had no right or authority to sell Poramboke and immemorial waste land They observed that the usual mode of proceeding for parties wishing to obtain occupation of particular lands, was to apply to the Officers of Government to be placed in possession on their executing an agreement to pay the usual assessment, and proceeded to state that "the rights of the Mirasidars over immemorial waste are confined to the pasturing of their cattle, the cutting firewood etc., and similar common privileges, but these must always give way to any proposition ensuring the extension and realization of the public revenue".

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In 1839 the Collector of Chingleput addressed the Board of Revenue on the claims made by the Mirasidars when lands were offered on Darkhast and on certain irregularities which, in his opinion, were causing loss of revenue to the Government. In his opinion the proprietary right of the Mirasidars did not extend to immemorial waste lands and that they had no prescriptive right to oust Payakarry cultivators from lands which were given to them by the Government owing to the Mirasidars not having cultivated them. He, however, admitted the Mirasidars' right to Toondoovaram, Swatantrams etc., in the Sheikal lands and suggested that Payakarry ryots, introduced by the Government, should be secured in their right of occupancy on paying to Government the Government dues and the Mirasidar's fees.

The Board of Revenue in their proceedings, dated the 29th August 1839, referred to their proceedings of the 15th August 1839 (above referred to by me) and observed as follows :—" As regards the right of the Mirasidars to the occupancy of waste, the Board of Revenue, though they have already recorded their opinion against the asserted right of the Mirasidars to the absolute disposal of waste lands from which they have derived no benefit for a long series of years, are still inclined to believe that it would be proper, and at the same time consonant to usage, to give them the preference of posssession when offers are made to bring the waste under cultivation. It should be the care of the Collector to ascertain that the parties offering for the lands possess the means to cultivate what they propose, and in these cases if the Mirasidars decline to undertake the payment of the demand, the lands should be given to the parties offering."

On the 28th July 1841 the Board of Directors addressed a Despatch dealing with the rights of the Mirasidars to waste lands. At that time a suit was pending in the Zillah Court of Chingleput where certain Mirasidars had sued the Collector and others for possession of lands granted by the Collector to non-Mirasidars without their consent. The Court of Directors in their Despatch make the following observations :—"Without entering upon a discussion of the respective rights of Government, and the Mirasidars, over the waste lands, (a point still under the consideration of the Superior Tribunal to which the case has been appealed) it will be enough for us to state our opinion that it is desirable that, in all cases where Payakarries propose to cultivate the waste lands of a Mirasi village, their proposal should be, in the first instance, communicated to the Mirasidars, to whom, in the event of their being willing to cultivate, or to give security for the Revenue assessable on the lands, the preference should be given. We consider that the Government has a clear right to the Revenue to be derived from the conversion of waste lands into arable, but we at the same time think it preferable that this object should be attained

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whenever practicable, without causing the intrusion of strangers into the Village community" (pages 455 and 456 of the Mirasi Papers).

The suit in the Chingleput Zillah Court (to which I shall refer later on) was disposed of by the Provincial Court on the 17th November 1841 in favour of the Mirasidars.

On the 3rd July 1844 the Court of Directors addressed a Despatch in continuation of their Despatch, dated the 28th July 1841. They directed that "when proposals were made by Paracoody Ryots for waste lands in Mirasi villages, they should, in the first instance, be communicated to the Mirasidars, to whom, in the event of their being willing to cultivate, or to give security for the revenue assessable on the lands, the preference should be given"; and they directed that on all occasions care should be taken that the just rights of the Mirasidars were respected.

On the 11th February 1856 the Government was of opinion that the Mirasidars had no right to convert immemorial waste to any other condition or to any other use, without the permission of the Government.

On the 8th March 1856 the Government in proceedings observed "The Village communities are certainly the parties entitled to occupy the land thus newly made available for cultivation, and they are quite competent to divide it among themselves according to local customs and known rights" (page 536 of the Mirasi Papers).

On the 14th May 1856 the Board of Revenue considered the whole question and reviewed the situation. They were 'inclined to the view that the Mirasidars should have the option of cultivating waste lands of every village before strangers are admitted and that if they refused to cultivate the lands they would have no right to receive any fees or rent from the persons to whom the Government had alloted the lands.

The question of the Mirasidars' rights arose again in 1856 in connection with a complaint made by one Rangappa Naik who alleged that he was dispossessed. The Board were inclined to the view that the land claimed by Rangappa Naik being poramboke was not part of the Miras and that the Government could give it to whomsoever it pleased. The Government dissented from that view and in their letter to the Court of Directors observed as follows:—"After a careful consideration of the case we are unable to concur in the Board's opinion of its merits. In addition to Mr. Forbes' testimony to the custom in Tanjore which in our opinion was entitled to much consideration, we hold that the best authorities were agreed that in Miras villages the Miras extended to waste as well as to arable land. This right we remarked was not

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exactly the same in regard to waste as it was in regard to arable, as was clearly explained by Mr. Ellis ; but in both cases it equally excluded strangers. The Board objected on the ground that the land in question being "Poramboke" could not be regarded as simple waste but we remarked that land required and used for roads, the sites of houses, threshing floors and some other purposes, was taken out of the arable extent as not being available for culture and was classed with rocks, hills &c. under the term Poramboke, but that as soon as such land ceased to be required for such particular purpose, it ceased also *ipso facto* to be Poramboke, and became subject to the ordinary laws affecting waste. Holding these views we were of opinion that the Memorialist had suffered a wrong in that his Miras land had been given to another in spite of his opposition." (page 555 of the Mirasi Papers).

The Court of Directors in their Despatch, dated the 17th Decmber 1856, to the Government of Madras desired that in the disposal of waste lands the principles laid down in the Desptch of 28th July 1841 and 3rd July 1844 (already referred to by me) should be followed.

Prior to 1855 the lands which the Mirasidars actually cultivated were entered in their own pattas whereas the lands which they cultivated through Payakarries found a place in the Samudayam patta. But subsequently the Mirasidars were called upon to declare once for all how much of their Pangu lands they wished to retain in their holding and were assessed upon those lands whether they cultivated or not.

On the 22nd April 1869 special Darkhast rules were issued for the Chingleput District, Rule 7 states that " the Mirasidars shall have the prior claim over all comers : Payakaries holding Puttahs have the next best claim, and objections made by them will hold good against non-resident cultivators. Should the Mirasidars oppose the application, and request that the land may be given to them in shares proportionate to their respective claims their request shall be complied with."

Rule 13 enacts that "beds of tanks not hitherto usually cultivated, threshing floors, burning grounds, burial places, cattle-standing grounds, land situated within 10 yards of tank bunds and roads, shall not be given away on Darkhast, and applications for Gramanattum or village sites shall not be entertained."

In 1872 the Government passed Proceedings regarding Gramanattam lands. These Proceedings were passed after a consideration of the proposals of the Board of Revenue and the replies of the Collectors of all the Districts. In paragraph 22 the Government observe that "the true view of the case is that Gramanattam is the communal property of the villagers, and that the Collector can only interfere with a view to benefit the community, and when his action is consistent

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with the common law." They then proceed to state that a special enactment would be necessary to alter the state of things, that in purely Mirasi villages, where the entire area belongs to the Mirasidars, the Gramanatham no doubt appertains to them equally with the other poramboke but that such cases are exceptional and that the Board will instruct Collectors to re-assert the prerogative of Government by making it known that, except in Zamindari and Mirasi villages which are private property, sites on the Gramanatham are not to be appropriated without permission.

Till 1890 the Village accounts in several villages of the Chingleput District contained entries where the Mirasidar's name was entered and also the name of the actual person who was in possession. This system was known as "double entry system" and sites were described as " the site of so and so resided in by so and so". Mr. Mullaly, who was then the Sub-Collector, raised objection to this procedure. The Board in dealing with the question recommended its discontinuance but were fully alive to the difficulty of opposing the Mirasidars' claims. They observe "Undoubtedly the Mirasidars have a great deal of evidence to support their claim, and if it is to be disputed, the strength of Government must lie in the fact stated by Mr. Galton in the Nemalicheri case that Government has never acquiesced in it. If the system of " double entry " now brought to notice for the first time is not stopped, this strong, argument will cease to exist. Moreover, the Board thinks that the *dictum* of Government referred to in paragraph 6 of the Board's Proceedings of the 7th July 1886, No. 1547, (in G. O. No. 1684 dated 16th December 1872 already quoted by me) must now be contradicted or explained. The fact that it is not mentioned by Sir Charles Turner in his judgment in the Vyasarpadi case (Civil suit No. 128 of 1882), or in any of the petitions which have been presented to the Board by Mirasidars, shows that it is not known to outsiders at present, but it may become known to them at any time and it reads as if it were a distinct acquiescence in the claim".

On the third September 1890 the Government passed orders directing that the practice of registering the name of a Mirasidar, as well as that of the occupant, in the house site accounts should be discontinued.

In 1892 the question of the Mirasidars' right again came up for consideration in connection with the granting of sites to the Pariahs and other low caste sections of the community. The Board of Revenue sent up their proposals to the Government. In paragraph 9 of their Proceedings dealing with Mirasi system the Board observe as follows:—"Briefly, the system, as it at present exists, rests on the claims

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of the Mirasidars to all the waste lands in their villages and to the levy of Swatantram or fees from Payakaries or non-Mirasidars who may take up land for cultivation. This claim was fully recognised in the new settlement carried out in 1876-78 (*vide* G. O. dated 15th February 1876, No. 221) and after full consultation with the Mirasidars, a memorial fee (swatantram), fixed at an average rate of annas 2 on every rupee of Government assessment, was declared to be leviable by the Mirasidars not only one very field lying waste in each village, but also on all lands now held by the Mirasidars themselves and included in their pattas, should such lands be subsequently relinquished and taken up by a non-Mirasidar. The fee claimable on each field was duly entered in the settlement registers against every field liable to it. The only lands against which fees were not entered were those which had already been obtained by strangers and which were held under lease or patta from Government. The absolute right of the Mirasidars in the waste lands of their villages was finally settled by the Courts in 1883 when the Government was compelled by the High Courts to pay compensation to the Mirasidars of the Vyasarpadi village, near Perambur, for waste lands taken up for public purposes." After dealing with the Judgment of Sir Charles Turner, the Board observe. " It is impossible at the present day to question the rights of the Mirasidars. It is altogether unnecessary to consider whether the survival of these Mirasi claims is due, as remarked by Mr. Tremenheere to the conservative effects of the decisions of the Mayor's Court of Madras. * * * * * * As forcibly remarked by the Board (Board's Proceedings, dated 1st April 1874, No. 754, para. 8, Board's Proceedings, dated 25th May 1875, No. 1415) 'the system is strongly rooted in law and immemorial custom. It is there and must be regarded in many respects neither more nor less than a great but necessary evil'. 'It is of great antiquity,' 'is dearly cherished' and has existed with more or less vitality 'notwithstanding many years of persistent efforts to crush it'." Regarding Darkhast rules they observe as follows:—"In 1869 special Darkhast rules (or rules governing applications for land for cultivation) were prescribed for the Chingleput District in which this preferential claim was distinctly recognised (Board's Proceedings, dated 22nd April 1869, No. 2710). In 1887 a proposal was made to assimilate these special rules to those of other districts in which Mirasi rights are not recognised, but Government declined to sanction the change (G. O. dated 21st October 1887, No. 6297, recording Board's Proceedings, dated 21st September 1887, No 588). The chief point of difference between these special rules and those prescribed for other districts, apart from the fact that any land in Chingleput obtained by a non-Mirasidar must pay two annas in the rupee of assessment as a memorial

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fee to the Mirasidars, is that in Mirasi villages the Mirasidars have preference over all comers while in non-Mirasi villages the preference is confined to those who own lands adjoining those applied for and to pattadars who take precedence over those who do not hold lands."

In dealing with the rights of Mirasidars the Government observe "The preferential right of the Mirasidars to the occupation of the waste was deliberately recognised by the Court of Directors in 1841, after considerable discussion in which the views of Sir Thomas Munro quoted by the Memorialists were duty considered." Then they set out Sir Thomas Munro's Minute and observe "Sir Thomas Munro merely dissents from the proposition that the 'exclusive use of the waste' was secured to the first settlers and that this right was good as against Government"; but that Sir Thomas Munro did not deny the preferential right of the Mirasidars to occupation of the waste. The Government observe that "the question of ownership of Pariah house sites is one of legal right, and if the Mirasidars have it they can only be expropriated by compensation; they cannot be deprived of their rights, however oppressive the exercise of them may be, by mere executive order."

In 1909 the Special Settlement Officer (Mr. G. A. D. Stuart) made certain proposals as regards Mirasi rights. As regards Mirasi tenure he proposed a fixed fee of 2 annas in the rupee of assessment of both dry and wet should be collected and paid to the Mirasidars.

The Board of Revenue in dealing with Mr. Stuart's proposals resolved to omit from the Patta Settlement Register all reference to Mirasi privileges.

The Government passed orders on the 19th October 1909 and in dealing with the preference under the Darkhast rules observe that "it would not be equitable to go behind the arrangement made in the settlement of 1877-78 recognising the preferential right of the Mirasidars to cultivate waste." As regards Swatantrams, the Government observe as follows:—"The Government agree with the Board that all reference to Swatantrams and Miras privileges should be omitted from the re-settlement register and that the following foot-note should be substituted for the existing foot-note in the memoirs on mirasi tenure:—'The right of the Mirasidars to levy a fee at the rate of 2 annas in the rupee of the assessment of both dry and wet lands has been recognised by Government except in the case of the under-mentioned fields which are free of Swatantrams so long as they are held under the terms of the original grants'."

I have set out in detail the various Proceedings which throw some light on the question of the rights of Mirasidars and on the

attitude which the Government took up from the date of its assumption of control over the Chingleput District. It seems to me that, although the absolute right of the Mirasidars to waste lands has never been acknowledged by the Government, their preferential right to the land has never been questioned; but, on the contrary, has been unequivocally admitted both by the Court of Directors and by the Government. Individual opinions of Government Officials have varied as to the origin and extent of Mirasi rights over waste and as to the rights of Mirasidars as against the Government. The preferential rights of the Mirasidars to waste lands of the village have been conceded but there is a great divergence of opinion as to whether the Mirasidars can as against grantees from the Government claim anything more than tunduvaram or the customary Swatantrams. The Mirasi Papers also show that the rights and privileges claimed by Mirasidars over waste have not been recognised in some districts and I find it difficult to construct out of the divergent opinions of Government Officials, the Board of Revenue, and the Government Orders any tenure with certain well defined incidents.

Turning to the judicial decisions on the rights of the Mirasidars, we find that there is a tendency in the later decisions to require proof of the rights claimed rather than treat Mirasi tenure as well recognised tenure with well defined incidents.

The first case of importance arose in 1808 and is reported in Strange's Notes of cases, Vol. I. The suit was in ejectment and was heard by Sir Thomas Strange and Mr. Justice Sullivan. The plaintiffs alleging themselves to be Mirasidars of the village of Tondiarpet stated that the defendants had trespassed and ejected them from the "Nathum" in their possession. The learned Judges discussed the evidence as to the claims and privileges of the Mirasidars and, while holding that plaintiffs were entitled to the Natham claimed, they dismissed the suit on the technical ground that the defendants were not found to be in possession of any portion of it. The Court, however, refused to adjudicate upon the rights as between the mirasidars and the Government observing that it was unnecessary to decide how far the Mirasidars' rights were subject to the intervention of the Government.

In 1836 the rights of the Mirasidars as against the Government were distinctly raised in a suit filed by Ranga Ayyangar and others against the Collector of Chingleput and the persons who got possession under titles conferred by the Government. The plaintiffs alleged that they were the only Mirasidars of Cannumtongul Village in Chingleput District, that the Collector (1st defendant) granted permission to the defendants who were not the Mirasidars of the village to bring under cultivation about 80 cawnies of waste land, that the plaintiffs offered to cultivate the whole of the

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waste land amounting to about 164 cawnies and in anticipation of sanction cleared about 60 cawnies for cultivation, and that the plaintiffs were dispossessed by the other defendants acting under the orders of the Collector. The defendants defended the suit on the ground that the land was waste and that the Collector could grant Cowle to any person for bringing it under cultivation. The plaintiffs filed a reply alleging that neither the Governmont nor the Collector had any power to grant waste lands without the consent of the Mirasi inhabitants, that waste land could not be given to strangers for cultivation without receiving a Razinamah from the Mirasidars and that they applied for the cultivation of the whole of the waste land when they heard that strangers had applied for it. A number of witnesses were examined and documents filed and the Chingleput court (Udalut Court) passed a decree in favour of the plaintiffs. The Court held that the evidence, showed that the plaintiffs were the Mirasidars and that the defendants had no Mirasi rights in the village. As regards the rights of Mirasidars the Judge observes as follows:—"That the Mirasidars alone have a right to sell and mortgage Warraput land, and that to every Mirasi share there is a certain portion of waste land attached, but that the particular parts of the waste land which belong to each individual Mirasi share are not usually known because those waste lands are seldom, if ever, divided, are facts which have been established by the evidence of witnesses in numberless cases before this Court; and as no one ever attempted to dispute the inherent right of Mirasidars to the waste land, it is evident that without the consent of the proprietors of the soil, the Collector has no authority to deliver any part of these lands to other persons. In this case it appears that the 7th defendant and others gave their proposals on the 2nd May 1835; this circumstance is not communicated to the plaintiffs, but they on the 4th May 1835 sent in proposals for 40 cawnies; but after this on hearing of the proposal made by the 7th defendant and others, they on the 21st May 1835, gave in an agreement to the Tahsildar, plaintiffs' document, No. 50, promising to take all the waste lands in the village at the full Teervah and to give security for the performance of their contract. On the 15th June 1835 the Collector grants the Cowle to the 7th defendant and others, in doing which the Judge is of opinion the Collector acted contrary to the acknowledged right of the plaintiffs." The Cowle granted to the 7th defendant and others was annulled and a decree was passed in favour of the plaintiffs. An appeal was filed to the Provincial Court by the Collector but the decision of the lower Court was affirmed on 17th November 1841. The Appellate Court considered that the only question for determination was whether the Government had power to grant waste lands in Mirassi villages to strangers without first obtaining the consent of the

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Mirasidars, and decided that the Government had no such power. No appeal was filed by the Government against this decision and the Board of Directors referred to this case in their Despatch, dated the 3rd July 1844, already referred to by me (see pages 456 to 469 of the Mirasi Papers).

In 1848 the plaintiff, who was a Mirasidar, sued to recover arrears of Swatantrams due to him for certain lands cultivated by the defendants. The defendants denied the right of the Mirasidar to levy such Swatantrams claimed and alleged that the lands for which they were claimed had been left waste from time immemorial by Mirasidars who declined to take them up and that the Government thereupon rented the lands to them. The suit was dismissed by the Sudder Ameen on the ground that the land in question was immemorial waste not forming part of the plaintiff's share, that the defendants held it not from the Mirasidars but from the Government, that in the Cowle granted to them there was no stipulation that they were to pay any Swatantrams to Mirasidars and that it was not customary to pay Swatantrams in such cases. An appeal was filed and the Civil Judge decided that Mirasidars had no right to levy Swatantrams from Peycarries who did not hold from them but under Cowles granted by Government for lands which were classed immemorial waste.

The previous decision of 1844 does not seem to have been brought to the notice of the Court and the remark of the Judge that the question has been frequently decided in the negative does not seem to be accurate. The Judge seems to have been of opinion that, where the Mirasidars fail to cultivate the lands and the Government exercises its right of granting Cowles to third persons, the Mirasidars are not entitled to claim any perquisites from the grantees. (See pages 485 and 486 of the Mirasi Papers.)

In 1844 a suit was filed in the Kumbakonam Munsif's Court by a Mirasidar to recover a piece of Samudayam land from the defendants on the ground that the land was within his Mirasi and was let to the defendants and that they failed to pay the rent. The defendants pleaded that the ground was Casawurgum, that they built a house and lived in it for several years paying taxes to the Government and that the plaintiff had nothing to do with the land. The District Munsif decided the suit in favour of the plaintiff, and on appeal the Sudder Udalut Court confirmed the Judgment of the Munsif and observed as follows—"It is clear that the land in dispute is within the Mirasi of the plaintiff and therefore in disposing of the question at issue it will be necessary to consider the privileges of the Mirasidars, the customs of the province, and the grounds on which the defendants claim to continue the occupation of the ground. The Mirasidars are the acknowledged hereditary

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proprietors of the soil. Those in Tanjore and other districts in which Mirasi right is recognised allow their Paracudis or under-tenants and others to erect houses on their Mirasi lands, but their doing so, neither destroys the Mirasidars' right to the lands, nor does it transfer the right to the Paracudis. So long as the Paracudis cultivate the Mirasidars' lands, they are entered in the accounts as Paracudis, but on ceasing to do so, they are called Casawurgums, which the appellants admit that they are. This change of denomination however does not in any way affect the relative position of the parties, and the assertion of the appellants that as Casawurgums they are independent of the Mirasidar, is not correct. On the contrary, the custom of the province is that, if a Paracudy ceases to cultivate and becomes a Casawurgum, the Mirasidar requires him to pay rent for a portion of his backyard which he would not do if he remained a Paracudy" (see pages 487 and 488 of the Mirasi Papers).

In 1850 the Sudder Court decided that Swamibhogam should be paid to the Mirasidar by a tenant let in by Government. (Sudder Court Decisions, Vol. I 1850, page 119).

In 1857 the Sudder Udalut Court held that Ulkudies had a right to sub-let the lands they occupied and that the Mirasidars were not entitled to eject the sub-lessees (see page 577 of the Mirasi Papers).

In 1860 the Sudder Udalut Court decided that, where a Mirasidar desired to eject a Casawurgam tenant who had been in possession of the property for a long time and had erected substantial buildings, the Mirasidar was bound to compensate him for the value of the buildings (see page 585 of the Mirasi Papers).

In 1861 the Sudder Court held that, where lands were abandoned and left waste by the original cultivators, they were at the disposal of the Revenue authorities and that the former occupants had no title to eject the parties who may have been placed subsequently in possession in accordance with the rules of the District and established usage (see page 590 of the Mirasi Papers.)

A similar view was taken in *Punniakoti Mudali* v. *Munisami*, [1].

In *Muniappa Mudali* v. *Kasturi Ranga Charriar* [2], it was held that in Mirasi villages the Mirasidars possessed the proprietary right in Samudayam lands.

In *Sakkaji Rau* v. *Latchmana Goundan* [3], the right of the Mirasidars to recover Swatantrams was raised. The plaintiff, as the sole Mirasidar, sued to recover possession of lands and arrears of Thoondutirwa and Thoonduvarakuppatham. The lands were granted

1 Sudder Court Decisions, 1862, page 2.
2 Sudder Court Decisions, 1862, page 50,
3. (1880) I. L. R. 2 M. 149.

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to the defendant by the Revenue Officer but it was not clear whether the Mirasidar had applied for the lands before the grant to the defendant. The first Court dismissed the suit in so far as it related to ejectment but passed a decree awarding the Thoondutirwa claimed. The District Court was of opinion that the plaintiff by omitting to take a revenue engagement for the lands, had relinquished his Mirasi rights and reversed the decree of the lower Court. The High Court at first held that, though the omission of the Mirasidar to cultivate might empower the Revenue authorities to introduce a cultivator, it did not further prejudice the prescriptive rights of the Mirasidar and that those rights would not be lost by the Mirasidars declining to receive a patta for the lands. A review of the Judgment was allowed and the case was re-argued. A Full Bench of the High Court considered the reports of the Collectors set out in the Mirasi Papers and the orders of the Board of Revenue and the Government and was of opinion that from the variety of opinions expressed they could not lay down as a uniform rule that Mirasidars were entitled to dues from cultivators holding lands within the area of the Mirasi estate under pattas from Government. They were of opinion that, where the right was denied there should be enquiry whether by custom it prevails on the estate or if there are not sufficient instances on the estate to afford grounds for a decision, on similar estate in the neighbourhood. A finding was called for on the following issue "Is the Mirasidar entitled, by the custom of the estate or neighbourhood, to demand payment of any, and, if any, what dues from ryots cultivating, under pattas from the Government, lands for which the Mirasidar has refused to engage ?".

Though it is expressly stated in the Judgment that there has been no law depriving the Mirasidars of any privileges they may have customarily enjoyed, their Lordships after a survey of various Government orders and opinions of officials were not prepared to lay down any general rule as to the rights of Mirasidars but left the matter to be decided on evidence in each locality. This decision marks an important departure from the attitude taken up by Courts previously and makes usage in each locality the criterion for coming to any conclusion as regards the rights of Mirasidars.

In 1882 the rights of the Mirasidars as against the Government came directly in question in respect of a piece of land within the Mirasi village of Vyasarpadi. The plaintiff alleged that the Mirasidars of Vyasarpadi sold a portion of waste land situated in their Mirasi estate to him, that he was in possession of the same, and that about the 26th April 1881 the Officiating Superintendent of the Gun Powder Factory, acting on behalf of and under instructions from Government, wrongfully took possession of

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the land and ejected him. The plaintiff claimed to recover possession of the land and also compensation. The Secretary of State for India filed a written statement pleading that the land was the property of the East India Company and subsequently became the property of the defendant and was in possession of the Government, that some persons erected a hut on the land and planted a hedge and in so doing committed trespass and that, after being warned to remove the said hut and hedge, they were removed by officers of Government. The suit came on for hearing before Sir Charles Turner sitting on the Original Side of the High Court and a decree was passed in favour of the plaintiff. The question for determination was whether by the Customary Law Mirasidars had any title to the waste lands within the area of the Mirasi estate. With reference to Mirasi rights to waste, Sir Charles Turner observes as follows:—"One question constantly occurring was the rights of the Mirasidar to waste. The better opinion appeared to be that he had a right to the waste, even though he paid no revenue for it, but that, if he omitted to cultivate what was cultivable by Paikarries the Government might issue pattas to strangers for its cultivation. There resulted a long struggle between the Mirasidars and the Government, the former unable to cultivate and unwilling to pay assessment on much of the land over which they claimed rights and on the other hand resisting the introduction of strangers. When pattas were granted to strangers, the Mirasi right was not altogether lost and in some villages the Mirasidars succeeded in obtaining from the ryots introduced by Government recognition of their interest in the soil by the payment of small cesses". After referring to the state of things in Bengal where a satisfactory solution had been arrived at by the Regulation 7 of 1822 he observes as follows:—"From the authorities I have consulted in this and other cases which have come before the Court I hold that Mirasidars have in this part of the Presidency certain property in the waste and that property enables them to dispose of the occupancy of the lands subject of course to the payment of revenue and that this property is not necessarily lost by non-payment of revenue. I need not refer to any further authority than the replies made by Mr. Ellis and Mr. Sankariah who was for many years Sheristadar in the Huzur Cutcherry of Madras."

In *Subbaraya* v. *The Sub-Collector of Chingleput*,[1] the question of the Mirasidars' rights was considered. The plaintiffs, as Mirasidars of the village of Vallipuram in the Chingleput District, alleged that a stranger made a Darkhast for certain lands in their village, that they objected to such a grant and claimed that a patta should

1. (1883) I. L. R. 6 Mad. 303.

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be issued in their own names and that the lands should be put in their possession. The defendants pleaded that the lands, although formerly held in common by the Mirasidars of the village, were subsequently relinquished, that it was competent for the Revenue authorities to arrange for the cultivation of the lands without reference to the former registered pattadars, that the lands were unoccupied waste at the disposal of the Government when they were assigned to the defendants and that the Civil Courts could not take cognizance of the suit. The District Munsif held that the Mirasidars had a preferential right to the lands and that the grant of a patta to the 2nd and 3rd defendants was invalid and that the Civil Courts had jurisdiction. The District Judge held that the Court had no power to order the Revenue authorities to transfer the registry of lands from one person's name to another and that, if the Mirasidars could be shown to have formally relinquished the plaint lands or acquiesced in such relinquishment by the former pattadars acting as their representatives, they had no cause of action against any of the defendants. Holding that the claim of the plaintiffs was one which the Government was bound to recognise, he was of opinion that the plaintiffs had relinquished the lands and had no proprietary right to them. Sir Charles Turner was of opinion that, where a Mirasidar ceases to cultivate waste lands within his Mirasi estate, or neglects to cultivate cultivable waste, the Government is at liberty to issue pattas to those lands to any stranger who will undertake to pay the assessment and that where there has been a mere relinquishment of the revenue engagement by the Mirasidar he does not lose his Mirasi right. He was also of opinion that a Civil Court cannot compel the Revenue authorities to make settlement with a particular person where the Mirasidars had abandoned their engagement and so given occasion to the Revenue authorities to offer engagements to others. Mr. Justice Innes was of opinion that the Mirasidars had abandoned their right and that the Collector was consequently empowered to grant the lands to strangers. Where, however, the relinquishment was not absolute but only for a period he was of opinion that, until the lands were sold for arrears of revenue, the Collector would have no power to dispossess the Mirasidars absolutely. This case seems to have proceeded on the footing that a relinquishment by the Mirasidars confers absolute power to Collectors to grant the lands to others and that the Mirasidars cannot subsequently lay any claim against the persons to whom the lands have been granted by the Government.

The view of Sir Charles Turner that it was open to the Collector to introduce strangers if the Mirasidar does not pay the Government dues was considered and dissented from in *Secretary of State* v. *Ashtamurti*,[1] where it was held that the only

1. (1889) I. L. R. 13. Mad. 89.

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remedy was a sale of the holding for arrears of revenue and that the Government had no right to let in any new Pattadar without having recourse to the remedies prescribed by Act II of 1864, Mr. Justice Shephard dissented from the view expressed by Sir Charles Turner and held that a suit would lie to compel the Collector to settle the assessment with the real owner and not with a third person. In dealing with the rights of Jenmies in Malabar he compares them to those of Mirasidars and observes as follows :—" The rights of the Jenmi are certainly not less extensive than those of the Mirasidar with which they have often been compared (see Mirasi Papers, page 434 and Appendix I). Yet the Mirasidar is generally entitled to a prior right to undertake the cultivation and consequent assessment, *Fakir, Muhammad* v. *Tirumala Chariar*, [1] Mirasi Papers, page 219, and he does not lose any prescriptive rights he may have by the fact that patta is given to another, *Subbaraya* v. *The Sub-Collector of Chingleput* [2]." Mr. Justice Shephard evidently thought that I. L. R. 6 Mad. 303 was in favour of the Mirasidars' preferential right.

In *Sivanatha Naicken* v. *Nattu Ranga Chari*, [3] the dispute was between Shrotriemdars and Mirasidars in respect of compensation awarded by the Government for lands taken up under the Land Acquisition Act I of 1894. The lands taken up were immemorial waste or jungle lands and the compensation amount represented the rent for the occupation of the land for five years as an artillery range and the value of the trees removed from it. The District Judge was of opinion that the Shrotriemdars were entitled to compensation as the evidence showed that they were actually exercising their right as owners of the land in question and leasing out those uncultivated lands on long leases. Mr. Justice Davies and Mr. Justice Benson were of opinion that the only question was whether as Mirasidars they were entitled to compensation for immemorial waste lands taken up under the Land Acquisition Act and observed that there was no allegation or evidence that such a right had ever been claimed or established against Government in villages where Government had not alienated its right to third parties. They observe as follows:—"The rights of the Mirasidars over immemorial waste (apart from their preferential right to cultivate) appear to be confined to grazing, cutting firewood and similar common privileges, as stated by the Board of Revenue in the passage quoted in this Court's judgment in *Sakkaji Rau* v. *Latchmana Gaundan* [4] but those rights were liable to be extinguished by the Government alienating the land. As already remarked there is nothing to show that the Government has ever treated the Mirasidars as entitled to compensation for

1. (1876) I. L. R. 1 Mad. 205. 2. (1883) I. L. R. 6 Mad. 303.
3. (1903) I. L. R. 26 Mad. 371. 4. (1880) I. L. R. 2 Mad 149 at p. 158.

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such curtailment of their communal rights. The Shrotriemdars stand in the place of Government in this case, and the evidence is that they have from time to time leased portions of the waste lands of the village to the Mirasidars of the village, and sometimes to strangers without giving the Mirasidars a share of the rent or other compensation. There is morever the recent admission of one of the leading Mirasidars, who is also an appellant, that in the village 'the poramboke lands belong to the Shrotriemdars: the 'tarisa' or uncultivated lands which are not in the holding of anybody else do also belong to the Shrotriemdars only,' (Exhibit B)." *Govindarajulu Naidu* v. *Venkataramanjulu Naidu*, Appeal Suit No. 76 of 1891 where the Mirasidars were allowed a part of the compensation given for land taken up under the Land Acquisition Act was distinguished on the ground that the facts were different.

From the facts appearing in *Sivanatha Naicken* v. *Nattu Ranga Chari* [1] it is clear that the Shrotriemdars and not the Mirasidras were proved to have exercised acts of ownership on the land. The observations of Their Lordships that the Government never treated the Mirasidars as entitled to compensation for the abandonment of communal rights is not correct. The Mirasi Papers and the judgment of Sir Charles Turner in the Vyasarpadi case show that compensation was awarded by the Government not only under decrees of Court but also out of Court. The decisions of the Sudder Court and the Provincial Court of Chingleput where the claims of the Mirasidars have been distinctly recognised over waste land and where strangers introduced by Government have been ejected at the instance of the Mirasidars, have not been noticed. Though the judgment is perfectly intelligible on the facts found that the Shrotriemdars exercised acts of ownership over the land and the Mirasidars admitted their rights, I am unable to follow it where the broad proposition was laid down that the rights of the Mirasidars were liable to be extinguished simply by the fact that the Government gave pattas to third persons.

Mr. Justice Benson, who was a party to *Natesa Gramani* v. *Venkatarama Reddi*, [2] expressly states in his judgment, when referring to *Sivantha Naicken* v. *Nattu Ranga Chari*, [1] that the decision proceeded on the facts proved in evidence as to the particular village and does not lay down as a matter of law that Poramboke lands in villages such as this in Chingleput District must necessarily be held to be the property of the Zamindar.

In *The Secretary of State for India* v. *M. Krishnayya*, [3] a question

1. (1903) I. L. R. 26 Mad. 371. 2. (1907) I. L. R. 30 Mad. 510.
3. (1905) I. L. R. 28 Mad. 257.

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arose as to the rights of the Government as regards forests and immemorial waste in South Canara District. This case has nothing to do with the Mirasi rights in Chingleput District and, so far as the present question is concerned, it is only authority for the position that there is a general presumption in law that waste lands belong to Government. At page 282 there is the following observation:—"Mr. Ellis compared the land tenures in Canara to those in the Arudi Karai villages to the South of the Coleroon on the East Coast, where the right of Government to the waste lands has now, after protracted contest, been established as against the Mirasidars." No reference has been made to any authority to establish the broad proposition laid down. I agree with Mr. Justice Sankaran Nair in holding that, with the exception of the observation in *Sivànatha Naicken* v. *Nattu Ranga Chari* [1], which is explained in *Natesa Gramani* v. *Venkatarama Reddi* [2], as having been decided not on any general principles of law but with reference to the facts of the particular case, there is no authority for the above observation, and that it should be treated merely as an *obiter dictum*.

In *Natesa Gramani* v. *Venkatarama Reddi* [2], the question arose as to whether a second crop raised with water from certan ponds in Poramboke or unassessed lands in the village was liable to any claim for rent by the Zemindar. Both the Revenue Courts before whom the suit came on and the District Court on appeal found in that village of the Chingleput District Poramboke or unassessed lands were generally the property of the Mirasidars. The High Court accepting the finding decided in favour of the Mirasidars.

Though at first sight it appears that this case was decided on the concurrent findings of the lower Courts, lower Courts seem to have arrived at the finding more with reference to the considerations as to the rights of the Mirasidars as set out in the Mirasi Papers than on the evidence which was very meagre. This case is, however, important as explaining *Sivanatha Naicken* v. *Nathu Ranga Chari.* [1] In dealing with the case Their Lordships Mr. Justice Benson and Mr. Justice Wallis observe as follows:—"With regard to *Sivantha Naicken* v. *Nattu Ranga Chari*, [1] we think the decision proceeded on the facts proved as to the particular village and does not lay down as a matter of law that Poramboke lands in villages such as this in the Chingleput District must necessarily be held to be the property of the Zamindar".

Mr. Justice Sadasiva Aiyar is of opinion that "there can be little doubt that till 1886 the inclination of the High Court was to hold that Mirasidars had ownership right in immemorial waste and in Nattam

1. (1903) I. L. R. 26 Mad. 371. 2. (1907) I. L. R. 30 Mad. 510.

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sites also." I do not think that the cases decided subsequently overrule the cases decided prior to 1886.

In 1894 a suit was filed in the District Munsif's Court at Tiruvellore by one Bhashyakarlu Naidu, the Ekabhogam Mirasidar of the Kathirvedu village, against the Secretary of State claiming to be the absolute proprietor of the Gramanatham in the village and seeking for a declaration of his title and an injunction restraining the defendant from levying any assessment on it. The written statement set up the absolute right of the Government to allot land for buildings and to allow cultivation on such lands as it thinks proper to the exclusion of the Mirasidars. The second issue referred to the question of the absolute right set up by Grovernment and the District Munsif held that, both on the general incidents of Mirasi tenure and on the facts of the particular case, the Mirasidar had a proprietary interest in the Natham but had no right to cultivate it as he pleased.

Though the appeal by Government to the District Court was dismissed, the matter was not taken up to the High Court.

O. S. 136 of 1899 on the file of the Chingleput District Munsif's Court was a suit by the Mirasidar to recover the value of trees standing on the Gramanatham Poramboke which had been cut by some Pariahs under orders of the Sub-Collector. The Government was a party to the suit. The plaintiff obtained a decree which was confirmed by the District Court and the Government did not carry the matter any further.

In *Chinnan* v. *Kondama Naidu*, [1] Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer considered the nature of the Toonduvaram demanded by Mirasidars. Mr. Justice Sadasiva Ayyar was of opinion that the original Mirasidar was entitled to demand from the Ulkudi Kudivaramdar some Swatantrams including what was called Tooduwaram the amount of which Swatantrams was a certain proportion of the gross produce raised by the Ulkudi tenant. He considered Swatantrams as 'a fraction of the fruits of the Kudivaram right which fraction can never be lost by the Mirasidar.' Mr. Justice Spencer was of opinion that, when there was a body of Mirasi proprietors, there were three instead of two to share and that the Toonduwaram was the landlord's share. This view is supported by the observations of Collins, C. J. and Muthuswami Ayyar, J. in *Chidambara Pillai* v. *Thiruvengadathiengar* [2].

Appeal Suit No. 76 of 1891 was decided with reference to a dispute between the Shrotriemdar and the Mirasidars of the village of Uttukadu as to compensation. The land which was taken up by the Government lay waste from time immemorial and was stony and incapable

2. (1918) 26 M. L. J. 169. 3. (1897) 7 M. L. J. 1.

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of cultivation, unless it was first levelled and cleared of stones. The Mirasidars, although they admitted that the Shrotriemdar had the Melwaram right in the property, contended that Uttukadu being a Mirasi village, the Kudiwaram right vested in them. The District Judge dismissed the suit on the ground that the plaintiffs did not prove that they were Mirasidars. On appeal Their Lordships Mr. Justice Muthuswami Ayyar and Mr. Justice Best found on the evidence that the plaintiffs were Mirasidars. They held that the Shrotriemdar and the Mirasidars had in law a joint interest in the land taken up, and that the compensation should be apportioned between them both. The whole judgment proceeds on the footing that, if the plaintiffs proved that they were Mirasidars of the village, their joint right to waste land followed as a matter of course.

Reference has been made by Mr. Grant to the observations of Mr. Justice Bhashyam Ayyangar in *Madathapu Ramayya* v. *The Secretary of State for India*, [1] to the effect that the Gramanatham or village site is presumably the freehold property of the Government. The Natham in question was in the Kistna District where Mirasi rights do not exist. There can be little doubt that in *non-Mirasi* villages the control of the Gramanatham vests in the Revenue authorities and that they are at liberty to grant portions of it at their discretion to applicants. I need only refer to *The Collector of Godavari* v. *Pedda Rengayya*, [2] and *Putloor Boyanna* v. *Golusu Asethu*. [3]. In the case of Mirasi villages different considerations prevail and the question is how far the absolute right of Government to waste lands is controlled by such of the incidents of Mirasi tenure as are in force by virtue of custom or usage recognised by the British Government and enforced by judicial decisions of competent Courts. If the question was merely one of preference the decision in *Fakir Muhammad* v. *Tirumala Chariar*, [4] which was followed in *Theivu Pandithan* v. *Secretary of State for India*, [5] would apply, but if the Mirasidars have a proprietary interest in the soil the rights are capable of being enforced if ignored by Government.

The conclusion I have come to is that while on the one hand the absolute right of the Mirasidars to waste land has not been made out it is open to the Mirasidars to prove that by custom or usage they have a proprietary interest in waste lands. Where such a right is proved the Government has no power to ignore the Mirasidars and grant the land whether it be cultivable waste or other poramboke to strangers and the Mirasidars can enforce their right by recovering possession. The absolute right of the Government to do what it

1. (1903) I. L. R. 27. Mad. 386.
2. (1908) 4 M. L. T 440.
3. (1914) 16 M. L. T. 48.
4. (1876) I. L. R. 1 Mad. 205.
5. (1898) I. L. R. 21 Mad. 483 at p. 458.

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likes with the waste in Mirasi villages has not been established. The various orders of the Court of Directors and the Local Government and the decisions I have already referred to negative any such right.

It is argued by Mr. Grant that the effect of Act III of 1905 is to vest in the Government all waste lands irrespective of any rights which vested in the Mirasidars before the date of the passing of the Act. It seems to me that the effect of Act III of 1905 is to vest in the Government lands which are not proved to be private property and that it is not a confiscatory measure. The effect is simply to throw the burden of proof, in cases of waste land, on persons who claim that it is their property. Even prior to the passing of Act III of 1905 the effect of the judicial decisions was that *prima facie* waste lands vested in the Government. I need only refer to *Vyakunta Bapuji* v. *The Government of Bombay*, [1] and *Bhaskarappa* v. *The Collector of North Kanara*, [2] which were referred to with approval in *The Secretary of State for India* v. *M. Krishnayya*, [3]. As pointed out by Mr. Justice West in *Bhaskarappa* v. *The Collector of North Kanara*, [2] though the introduction of British rule did not extinguish the private rights already acquired the principle from which we must start is that waste lands belong to the State. This, however, does not prevent Mirasidars from showing that by usage and custom they have a proprietary interest in the waste lands of a village, and that the rights of Government are controlled by their rights. No doubt the right of the Government to see that lands do not lie waste while there are persons who are willing to engage with Government and cultivate the lands entitles them to grant lands to strangers if the Mirasidars are unable or unwilling to bring waste lands under cultivation, but when they are willing and *bona fide* apply for waste lands, it is difficult to see how their claims can be rejected.

I have hitherto dealt with waste lands in general because it seems to me that Gramanatham is only one of the kinds of poramboke and there is no difference in the principle between the rights of Mirasidars to the various kinds of waste. So far as Natham is concerned, it is land which has been set apart for erection of dwellings for Mirasidars and the Ulkudi ryots and also for village servants (the Cheri being the portion set apart for Panchamas and 'Untouchables'). It was in all probability the original homestead of the settlers and the view taken by the Government in the G. O. of 1872 already referred to by me was that it was communal property of the villagers. I am unable to accept the argument of Mr. Grant that though Mirasidars may have preferential rights as regards cultivable waste the unoccupied Natham is the absolute property of the Government and can be granted

1. (1874) 12 Bom. H. C. R. App. I 2. (1879) I. L. R. 3 Bom. 452.
3. (1905) I. L. R. 28 Mad. 257.

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to anybody it pleases without reference to the needs of the Mirasidars. I am also unable to accept the contention of Mr. Sreenivasa Aiyangar that the Gramanatham being land which cannot under any circumstances be assessed the Government can have no right to dispose of the Natham as the right to claim revenue is the basis on which the right of interference by Government in Mirasi villages stands. The Government has always the paramount right of disposing of waste lands subject of course to such vested rights (either in Mirasidars or communities) as may be proved to exist. In Mirasi villages the division and allotment of waste was left to the Mirasidars as parties entitled to occupy the land and quite competent to divide it among themselves according to local custom and known rights (G. O., dated 8th March. 1856). It seems to me that the Government on the dissolution of village communities stands for executive purposes in their place and is clothed with all the rights of management which originally vested in the Mirasidars jointly. There can be little doubt that, before the dissolution of the village communities, the affairs of the village were managed by the Mirasidars in common. They were responsible for the distribution of lands, and they collected certain fees or Meeras from the villagers to meet the expenses of the village. The dissolution of the village communities naturally vested in the Government the administrative duties which were formerly exercised by the Mirasidars. The right of Government to allot lands to non-Mirasidars and to put such persons in the position of Ulkudies also gave the Government an interest in the Natham for, as a corollary to that right, the right of Government to grant sites in Nathams followed. It would be against all principle to hold that, though the Government can confer waste lands on ryots, they cannot give the ryots sites in the Natham to build on. The Government has, therefore, a double right in the Natham. One is the right of superintendence over the Natham which originally vested in the Mirasidars collectively and the other is to grant sites on the unoccupied portions of the Natham to ryots to whom they grant waste lands.

I do not think Courts ought to attach much weight to the argument that any recognition of the rights of the Mirasidars would work a great hardship on other sections of the community. There can be little doubt that Mirasi rights are capable of abuse but the remedy is by legislation. As observed by Innes, J. in *Fakir Muhammad* v. *Tirumala Chariar*, 1 the estimate of the conduct of the Mirasidars in this respect would have no bearing on the question of their rights.

A review of the authorities leads me to the conclusion that the mere fact that Government grants the whole or any portion of unoccupied Gramanatham to strangers is no ground for holding that the

1. (1876) I. L. R. 1 Mad. 205 at p. 209.

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preferential rights of the Mirasidars are extinguished in cases where the Mirasidars have proved the unoccupied Natham in the village has been used by them as communal property or has been treated by the Government as such. In considering whether the Mirasidars have anything more than the ordinary rights of preference which are conferred on non-Mirasidars by the Darkhast rules framed by the Government, it is difficult to ignore the following facts :—

(1) The resolution of the Court of Directors in 1844 and the Government Order in 1872;

(2) The acknowledged fact that Mirasidars had a right to levy Tunduwaram which has been defined by the Board of Revenue in their Minute of the 5th January 1818 as "the clear landlord's rent" and by Mr. Maclean in his Manual of Administration as "the profits of the Mirasidar owner after paying Government dues";

(3) The award of compensation to Mirasidars where waste lands were acquired;

(4) Decrees of Court granting relief to Mirasidars in suits for ejectment which necessarily presuppose the possession of an interest in immoveable property; and

(5) The framing of separate Darkhast rules for the Chingleput District in 1869 and the deliberate distinction between Mirasi and other villages in the previous settlements of the District and in the Standing Order No. 39 of the Board of Revenue issued in 1878 where "Collectors are directed to assert the prerogative of Government by making it known that except in Zamindari villages, Mirasi villages and villages which are private property sites in Gramanatham cannot be appropriated without permission." I find myself unable to hold as a general rule that the preferential right of the Mirasidars in Mirasi villages is the same as that of ryots in non-Mirasi villages.

The materials before me are not sufficient to enable me to hold that the Mirasi system is a well defined tenure with certain well recognised incidents so as to enable one in every case to start with the presumption that the Gramanatham is the exclusive property of the Mirasidars. The rights of Mirasidars in the various administrative districts into which the territory formerely known as Tondaimandalam was divided after British occupation have not been uniformly recognised by the Government and while in some districts the Mirasidars' claims dwindled down into a mere preferential right they were more extensive in others. There can be little doubt that the ryotwari system introduced by the East India Company dealt a very severe blow on the communal holding of property and destroyed village autonomy.

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to a considerable extent. The granting of separate Pattas and the right claimed by Government to confer occupancy rights on non-Mirasidars in case Mirasidars refused to engage or committed default introduced radical changes in the communal principle. As observed by Sankaran Nair, J. " it is now difficult to say whether there is any presumption of Mirasi right in any district or to what extent the village community have succeeded in preserving their rights".

The nature and extent of Mirasidars' rights over waste in any particular district or portion thereof must be proved in each case and I do not think that it can be laid down, as an abstract proposition of law that the right to eject grantees from Government of sites in the Natham or Cheri follows as a matter of course. Where, however, Mirasidars prove that they have been enjoying the Natham as common property or that by custom or user they acquired rights over it, the Mirasidars have the undoubted right of requiring the Government to recognise such rights and of ejecting persons brought on the Natham or Cheri by Government in violation of their rights.

The reference to the Full Bench is general and I do not think it necessary to find whether in the present case the Mirasidars have proved their alleged rights. This is a matter for the Divisional Court.

To conclude I am of opinion that

(1) In Mirasi villages the rights of Government over waste (including Natham and Cheri) are subject to the rights of the Mirasidars;

(2) The nature and extent of such rights are not uniform throughout the Presidency but vary, and the onus is on the Mirasidars to prove that any specified incidence attaches to Mirasi rights in any particular district, there being no presumption that Gramanatham is the exclusive property of the Mirasidars;

(3) The rights of Mirasidars over waste are not extinguished by the mere fact that the Government grants Pattas to strangers; and would answer the reference accordingly.

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Appendix A.

G. O. No. 1684, Rev., dated the 16th December, 1872.

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21. A consideration of these reports show that it is necessary to correct the idea acquired in consequence of the frequent interference of Revenue Officers in Gramanatham questions, that Gramanatham is the property of Government in a peculiar degree and that exclusive jurisdiction over it should be vested in Revenue Officers.

22. The true view of the case is that Gramanatham is the communal property of the villagers, and that the Collector can only interfere with a view to benefit the community, and when his action is consistent with the common law.

23. To alter this state of things a special enactment would be necessary. No authoritative enunciation of principle would suffice. Such a law would confiscate private property, and the end would not be such as to justify the means.

24. The following general Rules may be laid down :—

1. Unclaimed portions of the village site may be granted to any one resident or about to become resident in the village on a fixed scale, which must be laid down by the Collector of each District once for all.

2. Rent free additions to village site will be granted when there is no unclaimed Gramanatham available, but only in the case of resident villagers, and of Pattadars agricultural labourers, and village servants about to become resident in the village. These grants must also be limited by a fixed scale.

3. Where towns are developing, unclaimed Gramanatham sites may be sold by auction with the previous sanction of the Board of Revenue. The proceeds may be devoted to the improvement of the village.

4. Generally, if cultivation occurs on Gramanatham and it is in accordance with the custom of the District to charge assessment for it, assessment should be charged.

25. The question whether Mr. Levinge's order in Madura should be rescinded is a doubtful one. The Collector may report fully on it showing the amount of revenue involved if he thinks it necessary.

26. These proceedings will be submitted to Government.

No. 106. Order thereon, 16th December 1872 No. 1684.

Land Revenue.

The Government are not prepared to go so far as the Board of Revenue in declaring the Gramanatham to be the communal property of the villagers. By immemorial usage a portion of every village is assigned rent free as a site for the dwellings of the villagers; but as the old Hukumnamahs show the enjoyment of it is subject to regulation by the Government. In purely Mirasi villages, where the entire area belongs to the Mirasdars the Gramanatham no doubt appertains to them equally with the other poramboke but these cases are exceptional. In all other villages there are manifest

indications still of the necessity originally universal of obtaining permission to occupy from the Government authorities; the practice of taking upsites without application which apparently prevails in some districts having only arisen from the rights of Government being lost sight of by the local authorities.

2. The Board will therefore instruct Collectors to re-assert the prerogative of Government by making it known that except in zamindari Mirasi and Villages which are private property sites on the Gramanatham are not to be appropriated without permission and that if any are so taken up, they will be assessed or the appropriators will be prosecuted. The first rule prepared by the Board might then be adopted with the addition that land so granted must be built upon within a stated period, failing which or in case the building be allowed to go to ruin, the land will revert to Government and the community. A similar addition should be made to the second rule. The sanction of Government will of course be necessary for the alienation of revenue which will result from granting additions to village sites.

3. The third rule should be omitted and cases decided as they arise on special reference to the Board. The proposal to sell portions of the Gramanatham by auction does not commend itself to Government.

4. Rule IV cultivation as distinguished from gardening is an undoubted abuse and should be assessed, unless action is barred or owing to the long permission appears unadvisable. Pattas however should not be granted in any case.

There is usually a recognised limit of "backyard" the villagers being permitted to grow vegetables, tobacco &c , and such usage should not beinterfered with.

5. The rules laid down must necessarily be general and leave much to the discretion and forbearance of the officers by whom they are applied As an application to a Tahsildar would necesssitate an 8 anna stamp the Village Munsif may be authorised to grant sites up to a certain size, sufficient for an ordinary house and back yard. When more is required application must be made to the Tahsildar.

A register of grants should be opened and a title deed of some kind given in all cases.

6. In some villages the Gramanatham is of large extent far beyond present or future requirements, and the unoccupied portions are now overrun with prickly pear. Collectors should be authorised to grant such excesses on clearance Patta for cultivation taking care of course always to reserve enough for the villagers.

Appendix B.

G. O. No. 704, dated 3rd September 1890.

Passing orders on Board's report on the complaints of the mirasidars of the Madurantakam Taluq regarding the conduct of Jamabandi of their Taluq by Mr. Mullaly, the Sub-Collector, and certain other orders issued by that officer; and directing the discontinuance of the system of double entry in adangal accounts as regards village sites.

Resolution—Dated 24th June 1890, No. 362.

In its proceedings of the 7th July 1886, No. 1547, the Board rejected an appeal which raised the question of the right of Mirasidars in Chingleput to the ownership and full control of the Gramanatham or village site, and in doing so remarked that it was certain that the mirasidars had claimed the right in past times and probable (but only probable) that they had possessed it but it had never been admitted by Government. The Board came to the conclusion that all such claims should be resisted, though this claim at all events would probably be asserted in a court of law. Up to the present time, however, no such suit is known to have been filed.

2. Subsequently, in the papers recorded in Board's Proceedings, dated 6th September 1889, No. 617, it was brought to notice that, in some of the village accounts, village sites were entered, not with the "single entry" usual in other Districts as "the site of so and so," but with a "double entry" as "the site of so and so resided by so and so". Mr. Mullaly, the Sub-Collector, urged that this "double entry" was made by the Village officers, without any authority, expressly to support the claim of the Mirasidars to proprietary right, and that, not having been authorized by Government or any responsible officer it could not be binding. He stated that the "double entry" perpetuated and strengthened a belief that the mirasidars are the absolute owners of the village site, that this claim is constantly asserted and exercised and gives rise to gross acts of oppression and that the Mirasidars exact rent or service for house sites which Government intend to be free inasmuch as they tell Payakaris that they shall not have house-sites, or shall be evicted from those which they have unless they will pay them a certain rent or work for them at stated wages. He cites a case in which advantage has been taken of the "double entry" to threaten to evict a man oragadam whose family had occupied the house for years. In the first letter now under consideration the Collector sends up a case in which certain men have been evicted by Mirasidars from a site which had been held by the family from before the time of the paimash. In this case, a District Munsiff had decreed in favour of the claim of the mirasidars but the defendants had brought forward no satisfactory evidence as to their long possession of the site. The Taluk Magistrate, who tried a complaint, which was one of the sequel of the suit said: "It is evident that the prisoners *i.e.*, the defendants in the suit lost their suit owing to their own mismanagement of their case; and the statement as to the village accounts in the Collector's letter, dated 25th February 1890 No. 105 confirms this. Such mismanagement must often result from the fact that in such cases the litigant on one side is rich and influential and the litigant on the other side is poverty stricken and ignorant.

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The "double entry" prevents the law of limitation from acting, and this is a most important point, for, as Mr. Johnson said in the letter recorded in Board's Proceedings, dated 28th September, 1887, No. 688. "The mirasi bugbear is destined gradually to die a natural death if left to the ordinary operations of time."

3. On a consideration of these facts, Mr. Mullaly urged that in future the entry of house sites in the Village accounts should not be made in the form of "double entry" but in the form "single entry" that is that Government should cease to record the allegation that "so and so's site" belongs to such and such a Mirasidar. He urged that no entry in the Village accounts could make or destroy any private right, that it is not obligatory to continue to repeat entries because they have been made in former years and that the mere fact that a new form of account is opened will not alter the fact that in previous accounts certain old entries (not now repeated) are to be found. On the other hand, it is pointed out that the Mirasidars are prepared to contend in the courts that Government can be compelled to continue the old entries.

4. Before passing orders, the Board called for a report as to the extent to which the "double entry" system prevails. This has now been submitted, and the information is tabulated below:—

Taluq.	No. of Ryotwari villages in the Taluq.	Number of villages in which the "double entry" occurs.				Percentage of villages with "double entry" to total number of villages.
		In both paimash and Adangal.	In the paimash alone.	In the Adangal alone.	Total.	
PRINCIPAL DIVISION.						
Saidapet ...	210	31	20	37	88	Chingleput, 90.
Tiruvallur ...	224	17	5	27	49	Maduranthakam, 78.
Ponneri ...	158	2	25	10	37	Saidapet, 42.
SUB-DIVISION.						
Maduranthakam ...	351	140	59	75	274	Conjeeveram, 41.
Conjeeveram ...	297	43	55	24	122	Tiruvallur, 22.
Chingleput ...	236	108	34	70	212	Ponneri, 18.

5. It appears that the double entry does not exist universally, but is found to some extent in all taluqs and to a very large extent in Chingleput and Maduranthakam. A great number of these entries appears in the paimash. Many which have no corresponding entries in the paimash appear newly in the adangals (annual accounts). At first sight, it might be believed that these new entries have been fabricated, as Mr. Mullaly says, because the Village Officers wanted to support the mirasidars in their claim to proprietary right, but Mr. Lee Warner points out that most of the villages contained "porumanais," belonging to the mirasidars, and the mirasidars may have given sites out of these "porumanais" where the "double entry" occurs newly. The term "Porumanais" is defined by Mr. Price in the letter recorded in Board's Proceedings, dated 29th August, 1879, 2487, as "used to signify sites occupied in the natham other than by houses and backyards."

6. Mr. Lee Warner also states that an examination of the tarapadi accounts (or accounts of Mr. Barnard's Survey in 1776), shows that the Mirasidars then owned a disproportionately large share of the village site but not at all. They show that some "porumanais" which as has been stated were portions of the village site were then held by persons who were not Mirasidars, and they contain (so far as has yet been ascertained) no instance of the "double entry". As Government has never given a village site to nonoccupant Mirasidars, it follows that unless a mirasidar's claim is supported by these tarapadi accounts it is obviously invalid and the courts would probably hold that this is the case.

7. The Collector reports decidedly that in a great number of cases where the "double entry" occurs for the first time in the adangals, modern Mirasidars have set up titles to sites which have long been in the occupation of others, and in most of these cases the "double entry" has been newly made on the *ipsi dixit* of the Mirasidar without the knowledge of the unfortunate occupier" though even in such cases the occupant will often admit the Mirasidar's claim.

8. Under these circumstances, the Board resolves to recommend Government to order that the system of "double entry" shall cease.

The argument put forward by Mr. Mullaly and recapitulated in paragraph 3 (supra) are very forcible. The recent change which has been made in the whole system of village accounts shows that Government assumes that it can change the form of its accounts, and, so far as the Board is aware, this right has never been questioned. The Board has come to the deliberate conclusion that the claim of the mirasidars to the gramanatham must be resisted. It enables them to keep the payakaries in a state of servile dependence, and to checkmate the order of Government that land which the Mirasidars leavewaste may be given to payakaries by refusing such men places to live in. Undoubtedly the Mirasidars have a great deal of evidence to support their claim, and if it is to be disputed, the strength of Government must lie in the fact stated by Mr. Galton in the Nemalicheri Case (Board's Proceedings, dated 7th July 1886, No. 1547) that Government has never acquiesced in it. If the system of "double entry" now brought to notice for the first time is not stopped, this strong argument will cease to exist. Moreover, the Board thinks that the *dictum* of Government referred to in paragraph 6 of the Board's Proceedings of the 7th July 1886, No. 1547, must now be contradicted or explained. The fact that it is not mentioned by Sir Charles Turner in his judgment in the Vyasarpadi Case (C. S. No. 128 of 1882), or in any of the petitions which have been presented to the Board by Mirasidars, shows that it is not known to outsiders at present, but it may become known to them at any time and it reads as if it were a distinct acquiescence in the claim.

9. The practical result of these inquiries is to show that Mr Mullaly's attempt to redress the evils caused by the Mirasidar's claims to unoccupied portions of the village site universally and all at once was most injudicious. The matter is one which requires very careful treatment, and may involve Government in difficult and uncertain litigation. His attention should be called to the conclusion of Mr. Johnson's remark quoted above, which seems to the Board's eminently sound, and which is to the effect that any attempt to abolish the "Mirasi bugbear, summarily will lead to a temporary revival of the patient."

10. But though Mr. Mullaly has allowed the state of things in Chingleput to incite him to incautious action, it should not be forgotten that he had done great service by living to light two very important matters. One is the system of "double entry" which is the subject now before the Board, and the other is the act that the village servants of Government act as the servants of the mirasidars

and collect mirasi dues contrary to orders (Board's Proceedings, dated 13th May 1890, No. 3000).

11. "Whenever it can be proved that karnams have been guilty of the misfeasance indicated in paragraph 7, they should be severely punished, and whenever village sites are absolutely needed and the only way to satisfy the want is to contest the claims of Mirasidars to unoccupied portions of the village site, the Board considers that they must be contested. It is very desirable, however to avoid this in cases where the "double entry" appears in the paimash, or is supported by the "porumanai" considerations enumerated in paragraph 5.

(A true Copy and Extract).

(Sd.) A. G. CARDEW,
Ag. Secretary.

To

The Secretary to Government, Rev. Department.

With 14 tarapadi accounts, copies of Judgment, in calendar case No. 175 of 1889, and O. S. No. 162 of 1888, to be returned and with copies of Board's Proceedings, dated 29th August 1879, No. 2487, and 6th September 1889, No. 617.

Copy to the Collector of Chingleput.

Order—dated 3rd September 1890, No. 704, Revenue.

In the order of March 5th, read above, a complaint from the Mirásidars of Madurantakam Taluk, Chingleput District, regarding the action taken at Jamabandi by Mr. Mullaly, the Sub-Collector, was referred to the Commissioners of Land Revenue for full enquiry and report. To this order the Board's Proceedings of June 24th 1890, No. 361, is a reply.

2. The causes of complaint will be dealt with seriatim.

i. The Mirasidars allege that certain notices issued under the Sub-Collector's orders, regarding the registration of names in pattahs, threaten to infringe their rights. The notices in question were issued by the Tashildar of Maduranthakam, and intimated that pattahs would in all cases be made out in the names of the present occupants of the land. The Sub-Collector was apparently desirous of carrying out the orders of Government on the subject of securing correspondence between ownership and revenue registry, but he admits that the Tashildar's notices went much further than was intended and the Collector cancelled them as soon as they were brought to his notice. The Thasildar has been called upon to explain his action and the explanation should in due course be submitted for the information of Government. The petitioners's cause of complaint has been removed by the cancellation of the notices.

ii. The petitioners state that the Sub-Collector wishes to remove their names from the adangals in respect of house sites, rent free gardens, and tax paying trees situated within the village site, wherever these are held by porakudes. The registry of house sites is discussed in the proceedings of June 24th, No. 362, read above, and will be dealt with later on as regards the other points. His Excellency the Governor in Council concurs in the opinion expressed by the commissioners that no change is required.

iii. The petitioners' complaint that pattahs are issued to cultivators for Sivayijamah cultivation, in contravention of the special darkest rules, prescribed for the Chingleput District. Mr. Mullaly does not deal with this point in his report, but the Collector Mr. Thomson, has issued orders that notice should be given to all Mirasidars of the probable assignment of lands in their villages at the time of Jamabandi. These orders form a sufficient answer to the petitioners' complaint.

iv. Mr. Mullaly is said by petitioners to have commenced Jamabandi at an early date and to have buried through the work in order to avoid giving remissions for waste and "shavi" he is also accused of having altered the rain registers with a view to showing larger quantities of water in the tanks than were actually received. These complaints have proved to be absolutely groundless Mr. Mullaly began his Jamabandi earlier than usual under special orders from the late Collector, Mr. Lee Warner, and the allegation, regarding haste in carrying out the work, is characterised by a subsequent Collector, Mr. Thompson "as silly and vindictive." With regard to the alleged alteration of the rain registers, it is merely necessary to observe, that Mr Mullaly, under the express orders of the Collector, made a careful examination of account No. 20, *vis* the register of supply received and distributed in the various tanks.

The petitioners final prayer is that Mr. Mullaly should not be allowed to carry out the Jamabandi of their taluk and need not be considered now. The matter was fully discussed at the time, and it was agreed that no interference with existing arrangements was desirable.

3. In Mr. Mullaly's report upon the above petition several irregularities are brought to light these are :—

(*a*) Variations between entries in thandals and in receipts given to ryots.

(*b*) A dual system of accounts, a true thandal and a Government thandal, and

(*c*) Illegal attachment of moveable property, not belonging to pattadars.

The system, which has now been abolished, of allowing village officers to collect Mirasidar in addition to the Government takes, appears to have been responsible for the first two of these irregularities regarding the third the Board has called on the Collector for a full report, and the result should in due course be submitted to Government.

* * * *

2. Mr. Mullaly was in charge of the Sub-Collectorate of this District in 1885, when, having had his attention drawn to the miserable condition of the labourers living in the villages, where mirasi claims are asserted to their fullest extent by the resident pattadars, he endeavoured to help matters by recommending and giving extentions of village in poramboke and other places for the exclusive occupation of the oppressed class. I may say once for all that this is a policy which has been entirely discouraged by me since I took charge of the District. On his return to the district in 1888, Mr. Mullaly appears to have gone into the subject again in his own way; and before the last Jamabandi he issued instructions for the preparation, by the karnams of village accounts showing accurately the extent to which the village sites have been appropriated along with the names of the occupants This was done without any consultation with me, and later on, when I insisted upon having a report, he wrote as follows:—"Mr. Fiddian ordered last Jamabandi that no account should be kept of village site, but as numerous complaints had been received and as in standing order No. 37 Collectors are directed to assert the prerogative, of Government in village sites, I consider it

necessary to have an account showing in its appropriation. I accordingly directed the karnams to show, in the adangal present occupation and vacant sites. The immediate result of these instructions to the karnams was, as a matter of fact, that whereas from the time of paimash till now, the adangal contained first the paimash numbers, then the name of the mirasidar or mirasidars claiming the over lords of these numbers, and lastly, the name of the real occupant, who was claimed by the mirasidars, to be holding under them, in this year, except on these sites, which the mirasidars are actually occupying with their own houses and backyards, their names have disappeared from the accounts.

* * * *

4. The next point for consideration is the alleged ownership of mirasidars in village sites. In July 1889, Mr. Mullaly brought to the notice of the Collector the miserable house accommodation at the disposal of the labouring classes in his division, and attributed most of the difficulties standing in the way of any improvement to a system of entering in the village accounts, against many of the house-sites, both in the names of the mirasidar claimant and of the resident porakudi. This system he christened the "double entry system" and it is with this subject that Board's Proceedings, No. 617, dated 6th September 1889, and No. 362, dated 24th June 1890, deal. The claims of mirasidars to vacant village sites have been before Government on several occasions, but the existence of this "double entry" system was until now unknown. The Board, in its later proceedings (No. 362) argues that the continuance of these double entries, after the practice of making them has been brought to light, will be tantamount to acquiescence on the part of Government in the claims of the mirasidars and recommends that the system should henceforward be abolished. This action the Board adds will amount merely to a change in the form of the register, and will not deprive the Mirasidars of any rights because no entry in a village account can make or mar any such right

5. After careful consideration, His Excellency the Governor in Council resolves to accept the Board's recommendation and for the future the name of the occupant alone will be shown in the registers of house sites. This decision is not however, based on the same grounds as those taken by the Commissioners, for in the opinion of His Excellency in Council, the abolition of the double entry system is more than a mere change in the form of account. The matter having been brought prominently to notice the Government would, as the Board points out, acquiesce in the claims of the mirasidars, by continuing the entry of their names, and the village accounts would at once become a *prima facie* record of their absolute and exclusive right to the Gramanatham of their villages. His Excellency the Governor in Council considers that the recognition of any such claims would be contrary to immemorial custom and opposed to public policy, and for these reasons, has resolved to abolish the system of double entry. It is true that in 1872 the Government declared that in the exceptional case of purely mirasi villages, where the entire area belonged to the Mirasidars the village site would also appertain to the same body, but the opinion expressed was stronger in appearance than in reality, for it formed part of an argument, contesting the view of the Board that village site was the communal property of the villages and did not appertain to Government. In any case His Excellency the Governor in Council is not now prepared to subscribe to the above dictum, and it is observed that when in 1886, the Board challenged the correctness of the order of 1872 the Government allowed the challenge to pass unnoticed. The said order has thus practically become a dead letter, in so far as it acknowledges the claims of mirasidars to village sites, and in the revised edition of the Standing

Orders the words "Mirasi villages" have been omitted from Standing Order No. 37 (formerly No. 39).

6. But while the Government accept the Board's recommendation to abolish the system of double entry, it considers that any distinct disavowal of the mirasidar's claims, such as Mr. Mullaly proposes to make, would be both injudicious and unnecessary. By discontinuing the system in question, the Government does not destroy the rights claimed but merely imposes upon the claimants, the burden of sustaining their claims, although at the same time it refrains from perpetuating and strengthening the belief, that mirasidars are the actual owners of village sites. In the papers now under consideration, various instances are forthcoming in which resident porakudis have been grossly oppressed under cover of the mirasidars' alleged rights, and the recognition by Government of such rights is in the opinion of His Excellency in Council inconsistent with the welfare of the people.

7. The Government concurs in the remarks made by the commissioners at para. 9 of their proceedings, No. 362, dated 24th June 1890.

8. Paras. 1 & 2 of this order will be communicated to the petitioners, who will further be informed that the Government has resolved to abolish the system of registering the name of a mirasidar, as well as that of the occupant, in the house site accounts.

(True extract.)

(Sd.) C. A. GALTON,

Secretary to Government.

Commercial Press, Madras, S. E.

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